Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

PAUL A. HEINRICH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, in light of this Court's decision in *Rapanos v. United States,* 126 S. Ct. 2208 (2006), the United States Army Corps of Engineers (the "Corps") was legally authorized to regulate a private property owner's development of a road through a private wetland, where the road had minimal environmental impact, and the wetland, by virtue of its location above local headwaters and the high water mark of a neighboring lake, has no substantial connection with, or impact upon, navigable waters.

2. Whether, in light of this Court's decision in *Rapanos*, the federal courts lacked subject matter jurisdiction to enforce the Corps' attempt to prohibit a private property owner from developing a road through a private wetland, where the road had minimal environmental impact and the wetland had no substantial connection with, or impact upon, navigable waters, and to sanction the property owner for using his property in this way.

3. Whether the extension of jurisdiction under the Clean Water Act to a private wetland adjacent to a water, deemed by Congress to be "non-navigable" for purposes of shipping and other maritime laws, exceeds the power of Congress under the Commerce Clause, Article I, Section 8.

4. Whether, when the Corps is legally required to notify the public of a regulatory obligation to obtain individual state water quality certification before a private wetland can be altered, but fails to do so, the imposition of sanctions and penalties against a private developer who alters a private wetland without notice of the certification obligation is prohibited by the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Paul A. Heinrich. Respondent is the United States of America.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul A. Heinrich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a–6a) is unofficially reported at 184 Fed. Appx. 542 (7th Cir. 2006). The order denying Mr. Heinrich's petition for rehearing and suggestion of rehearing en banc (Pet. App. 43a–44a) is unreported. The memorandum opinion of the United States District Court for the Western District of Wisconsin (Pet. App. 25a–42a) is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 6, 2006. (Pet. App. 1a–6a.) A timely petition for rehearing and suggestion of rehearing en banc was denied on December 18, 2006. (Pet. App. 43a–44a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 3 provides in pertinent part:

> The Congress shall have the power...To regulate commerce...among the several states....

U.S. Const. Amend. V provides in relevant part:

> No person shall be...deprived of life, liberty, or property, without due process of the law....

Section 59aa of Title 33 of the United States Code, provides in pertinent part:

> The portion of the Wisconsin River above the hydroelectric dam at Prairie du Sac, Wisconsin, is hereby declared to be a nonnavigable waterway of the United States for purposes of Title 46, including but not limited to the provisions of such title relating to vessel inspection and vessel licensure, and the other maritime laws of the United States.

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), provides in pertinent part:

> Except as in compliance with this section and section[]...1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides in pertinent part:

(a) The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material in to the navigable waters at specific disposal areas.

...

(e)(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

Section 502 of the Clean Water Act, 33 U.S.C. § 1362 (5)–(7), provides in pertinent part:

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water...

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

Section 328.3 of Title 33 of the Code of Federal Regulations, 33 C.F.R. § 328.3, provides the following definitions in pertinent part:

(a) The term *waters of the United States* means[1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

---

[1] The definitions of "waters of the United States" found at 40 C.F.R. § 230.3(s) and 40 C.F.R. § 232.2 are substantively the same.

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

...

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Section 330.2 of Title 33 of the Code of Federal Regulations, 33 C.F.R. § 330.2, provides in pertinent part:

(c) *Authorization* means that specific activities that qualify for an NWP may proceed, provided that the terms

and conditions of the NWP are met. After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's proposed activity complies with the terms and conditions of the NWP. A written verification may contain activity-specific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.

(d) *Headwaters* means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second....

Section 330.4(c) of Title 33 of the Code of Federal Regulations, 33 C.F.R. § 330.2(c), provides in pertinent part:

State 401 water quality certification.

(1) State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.

...

(3) If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its

right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States. (footnote omitted)

(4) DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.

(5) The DE will not require or process an individual permit application for an activity which may result in a discharge and otherwise qualifies for an NWP solely on the basis that the 401 water quality certification has been denied for that NWP. However, the district or division engineer may consider water quality, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit.

(6) In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWPs for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWP's. However, the DE and the state may negotiate for additional time for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual

401 water quality certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP....

STATEMENT OF THE CASE

INTRODUCTION

This case concerns the application of the Clean Water Act, 33 U.S.C. § 1251 *et seq*, and its implementing regulations to a private property owner's development of a road through a private wetland located above local headwaters and the high water mark of a neighboring lake.

In a ruling made thirteen days before this Court's decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006), the United States Court of Appeals for the Seventh Circuit held that Petitioner Paul Heinrich violated the Clean Water Act, and regulations promulgated thereunder, by building a grass-covered road through his private wetland. In that ruling, the Seventh Circuit also affirmed the penalty imposed by the District Court, which required Mr. Heinrich to pay a $75,000 civil penalty as well as the costs of restoring the affected wetland. (Pet. App. 6a.) In a petition for rehearing, Mr. Heinrich asked that the Court of Appeals consider the impact of *Rapanos* upon this case. Without comment, the Seventh Circuit declined to do so. (Pet. App. 43a–44a.)

Prior to this Court's decision in *Rapanos*, the lower federal courts were split with respect to the jurisdictional sweep of the Clean Water Act. The Court's treatment of the issue in *Rapanos* has not put an end to that conflict. If anything, *Rapanos* has exacerbated the confusion. This case therefore affords an opportunity for this Court (i) to clarify whether the Corps has any authority to regulate private wetlands which have no substantial connection with, or impact upon, traditional navigable waterways, and (ii) to

clarify the subject matter jurisdiction of the federal courts, when the Corps has improperly sought to prohibit a private property owner from developing a private wetland, and has invoked the power of the federal courts to punish him for doing so.

This case also presents the Court with the opportunity to address the Due Process implications of the Corps' efforts to punish a private party for utilizing his wetland in accordance with the Corps' Nationwide Permit 26 ("NWP 26"), but without also securing a state certificate -- when no published state or federal regulation gave notice that such a certificate was required. Notwithstanding this lack of notice, the Corps sought (and the lower courts allowed) the imposition of sanctions and penalties against Mr. Heinrich for failing to obtain that state certificate. Given the complexity of this area of the law, and the opportunity which that complexity affords for arbitrary treatment of citizens who seek to follow the law, it is important for this Court to clarify, for both the Corps and the lower courts, that meaningful notice is still required by the Due Process Clause.

In this petition, Mr. Heinrich respectfully asks that the Court grant certiorari and set this case down for plenary consideration. Alternatively, the judgment should be vacated and the case remanded for further consideration in light of *Rapanos*.

FACTS

Mr. Heinrich's Property. Mr. Heinrich owns 9.5 acres of lakefront property in Star Lake, Wisconsin. (Pet. App. 2a.) Eight of those acres are forested wetland. (Pet. App. 26a.)

Mr. Heinrich's forested wetland is white cedar swamp; it is above the ordinary high water mark of Little Star Lake and above the headwaters of the Wisconsin River watershed. (Dkt. 34 (Affidavit of B. D. Simon), ¶ 23; Dkt. 104

(Deposition of M. O'Keefe), p. 14, lns. 9-15.)[2] Mr. Heinrich's wetland abuts the Little Star Lake, which is a natural lake with about 100 acres of surface water and a maximum depth of nine feet. (Pet. App. 26a.) Portions of Little Star Lake are themselves wetlands and are so identified by the Wisconsin Wetlands Inventory Map. (Dkt. 21 (Motion for Summary Judgment by Heinrich), Exh. 4.) The portions of Little Star Lake abutting Mr. Heinrich's wetland are among the wetlands identified on the map. *Id.*

Congress has specifically determined that the waters with which Mr. Heinrich's wetland is contiguous are not "navigable waters."[3] Furthermore, by virtue of Mr. Heinrich's wetland's location upstream from the headwaters, above the ordinary high water mark,[4] and the minimal amount of water flow involved, Mr. Heinrich's wetland is distinct from neighboring water bodies. (Dkt. 34 (Affidavit of B. D. Simon), ¶¶ 33-38.)

Little Star Lake drains into Star Lake, which, through a series of tributaries, drains into the Wisconsin River and then eventually into the Mississippi River. (Pet. App. 26a; Dkt. 34 (Affidavit of B.D. Simon); ¶¶ 33-38.)

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[2] All citations to the docket, unless otherwise noted, are to the U.S. District Court for the Western District of Wisconsin Docket for Case No. 03-C-0075-S.

[3] In 1990, Congress declared all waters of the Wisconsin River watershed above the hydroelectric dam at Prairie du Sac to be non-navigable for purposes of shipping and other maritime laws. 33 U.S.C. § 59aa (1990). Mr. Heinrich's private wetland is upstream from this dam and non-navigable.

[4] In Wisconsin, Mr. Heinrich's wetland is deemed to be "upland," because it is above the ordinary high water mark of the neighboring lake. *Wisconsin v. Kelly*, 629 N.W.2d 601, 608, n. 13 (Wis. 2001); *State v. Trudeau*, 408 N.W.2d 337, 342, n. 5 (Wis. 1987).

Mr. Heinrich's Construction of the Private Road. In August 1997, Mr. Heinrich engaged a contractor to build a grass-covered road through his forested wetland. (Pet. App. 27a; Dkt. 26 (Brief in Support of Government's Motion for Partial Summary Judgment), Exh. 1 Nos. 9-12, Exh. 57-8.) The purpose of the road was two-fold: to provide access for logging and to provide access for Mr. Heinrich's seaplane. (Pet. App. 26a–27a.)[5] Other than the roadbed itself, all areas of the site remained a forested wetland, and there was no wetland disturbance outside the roadbed. (Dkt. 57 (Response to Proposed Summary Judgment Findings and Conclusions by Heinrich), p. 8, no. 12; Dkt 78 (Deposition of J. Olson), p. 40, ln. 20, p. 41, ln. 10.)

The activities undertaken by Mr. Heinrich were sufficiently minor as to fall within the Corps' NWP 26, as the Seventh Circuit acknowledged:

> "[Mr. Heinrich's] seaplane access road met the criteria of a Corps nationwide permit that was in

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[5] The Seventh Circuit expressed concern as to whether Mr. Heinrich accurately and consistently described the road's purpose. (Pet. App. 2a.) This is a point on which the parties disagree. Although Mr. Heinrich respectfully submits that he consistently stated that the purpose of his road was necessary for both logging and transporting his seaplane (Dkts. 23 (Brief in Support of Heinrich's Motion for Summary Judgment on Forestry and Res Judicata Issues), 56 (Brief in Opposition by Government to Heinrich Motion for Summary Judgment), 69 (Brief in Reply in Support of Heinrich's Motion for Summary Judgment on Forestry and Res Judicata Issues)), the issue has no bearing on this Court's consideration of this petition. The questions presented do not turn on the purpose or purposes of Mr. Heinrich's road, but on (i) whether the extension of federal jurisdiction over Mr. Heinrich's wetland is consistent with the Commerce Clause, the Clean Water Act, and relevant regulations, and (ii) whether Mr. Heinrich was denied Due Process, when the Corps decided, without notice to him, that an individual state water certification was required, and that he should be punished for not acquiring one.

> effect at the time, known as 'NWP 26', which allowed small projects like his with minimal environmental impact to proceed without advance federal approval. *See* 33 U.S.C. § 1344(e)." (Pet. App. 2a–3a.)

Thus, the Seventh Circuit specifically recognized that Mr. Heinrich's road had "minimal environmental impact," and there is no record evidence to show that the road had any significant effect on navigable waters or upon the nearby lake or downstream.

Mr. Heinrich's Communications with the Regulators. Mr. Heinrich is a lawyer, but he does not normally practice in federal court. Nor does he practice environmental law. Nonetheless, he attempted to represent himself in this matter from its inception through the filing of the petition for rehearing in the Seventh Circuit. At various times beginning in late 1996, Mr. Heinrich met with representatives of both the Wisconsin Department of Natural Resources and the Corps to discuss what regulations might apply to his project. (Pet. App. 26a–27a.)

During the relevant time period, federal and state wetland regulations were in flux. The Corps was in the process of issuing and re-issuing a series of Nationwide Permits, which, among other things, allow for fill activities in wetlands that cause little or no environmental harm. It was not until February 11, 1997 that the 1997 nationwide permits (including NWP 26) went into effect. 61 Fed.Reg. 65,874 (Dec. 13, 1996). As the Seventh Circuit determined below, Mr. Heinrich's road project complied with the requirements of NWP 26. (Pet. App. 2a.)

At the same time, however, relevant state water quality certification requirements also were in flux. As the Seventh Circuit explained in its ruling, federal regulations require that

a state evaluate an NWP to determine whether it complies with the state's own water quality standards. If it does, the state grants blanket water quality certification for the NWP. (Pet. App. 3a; 33 C.F.R. § 330.4(c).) If a state denies certification for a particular NWP, or if the Corps deems the conditions imposed by a state to be the equivalent of a denial, individuals seeking to proceed under an NWP must obtain individual water quality certifications. (*Id.*)

Here, Wisconsin attempted to partially grant water quality certification for a number of nationwide permits, including NWP 26. (Dkt. 25 (Partial Motion Summary Judgment by Government), Exh. DS2.) However, as the Seventh Circuit noted, the Corps determined on April 30, 1997, that Wisconsin's position was inconsistent with the Corps' regulations and therefore interpreted Wisconsin's position as a constructive rejection of NWP 26. (Pet. App. 4a.) This determination was not published in the Federal Register or otherwise made public; it was simply communicated by letter from the Corps to the State. Significantly, most of Mr. Heinrich's meetings with the regulators occurred before this time, and none included a discussion of NWP 26. (Dkt. 104 (Deposition of M. O'Keefe), p. 99, lns. 6-9; pg. 104, lns 12-17.)

As a result of the Corps' April 30, 1997 determination, an applicant seeking to use NWP 26 – like Mr. Heinrich – would also have to obtain an individual state water quality certification. But no official public notice was given to Mr. Heinrich (or to anyone else) that the Corps had interpreted Wisconsin's decision as a denial of blanket certification, or that Wisconsin landowners therefore could not proceed with their projects by relying on NWP 26, but would also have to obtain an individual state water quality certification.

Because of the flux in permitting requirements, and the Corps' failure to give notice that an individual water quality

certification would also be required, Mr. Heinrich did not obtain an individual state water quality certification. The absence of such a certification provided the United States Environmental Protection Agency ("U.S. EPA") with the basis for its enforcement action against Mr. Heinrich in the District Court.

The Initiation of the District Court Litigation. On November 20, 2000, the U.S. EPA issued an administrative compliance order under the Clean Water Act, 33 U.S.C. § 1319(a), requiring Mr. Heinrich to "restore" his private wetland. (Pet. App. 28a.) That administrative compliance order was later amended on February 9, 2001. (Dkt. 39 (Affidavit of G.T. Carlson), ¶ 10.)

On February 7, 2003, Mr. Heinrich filed a quiet title action seeking to resolve his legal status. (Dkt. 2 (Complaint) of Case No. 03-C-0071-S in the U.S. District Court for the Western District of Wisconsin.) On February 11, 2003, the United States filed its Clean Water Act enforcement action against Mr. Heinrich in the United States District Court for the Western District of Wisconsin. (Dkt. 2 (Complaint).) The two actions were consolidated on April 24, 2003. (Dkt. 14 (Order consolidating action with Case No. 03-C-0071-S.)

The Decision of the District Court. In the District Court, Mr. Heinrich and the Corps both moved for summary judgment on the government's complaint.[6] Among the issues considered by the District Court was whether Mr. Heinrich's wetland constituted "waters of the United States" under the Clean Water Act. (Pet. App. 31a–33a.)

The District Court granted summary judgment for the government, imposed a monetary penalty of $75,000, and ordered Mr. Heinrich to implement a restoration plan for the

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[6] Mr. Heinrich's quiet title action was dismissed prior to the summary judgment briefing.

property. (Pet. App. 7a–9a, 42a.) Among other things, the District Court held that Mr. Heinrich's deposit of fill material to create a roadbed in his private wetland constituted an unpermitted discharge into "waters of the United States" under 33 U.S.C. § 1362(7). (Pet. App. 29a–39a.) In reaching this result, the District Court concluded, in pertinent part, that Little Star Lake is a tributary of the Wisconsin and Mississippi Rivers, and that Mr. Heinrich's wetland is "adjacent to" Little Star Lake. (Pet. App. 32a–33a.)

The Seventh Circuit's Decision. On appeal, Mr. Heinrich argued that a state water quality certification could not be required for NWP 26 projects in Wisconsin, such as his, because (a) Wisconsin had not met applicable deadlines for submitting its state water quality certification to the Corps, and (b) proper public notice of this requirement had not been given. (Pet. App. 3a.) In addition, among other things, Mr. Heinrich argued that the District Court abused its discretion by imposing the penalty it did. The Seventh Circuit rejected these arguments. (Pet. App. 1a–6a.) In particular, the Seventh Circuit stated that although the Court "might agree" with Mr. Heinrich "that Corps officials should have done more to let those potentially affected ... know that they had to get individual certifications" (Pet. App. 5a), the Corps' failure to do more did not violate any statute or regulation regarding notice by publication. (*Id.*)[7]

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[7] The Seventh Circuit also acknowledged that applicable regulations require Corps district engineers to "take appropriate measures to inform the public of which authorities, water bodies, or regions require an individual ... water quality certification before authorization by NWP." (33 C.F.R. § 330.4(c)(4); Pet. App. 4a–5a). Despite this requirement, Mr. Heinrich was never notified of the actions by the Corps which established the basis for his alleged obligation to obtain an individual water quality certification. Nonetheless, the Seventh Circuit faulted Mr. Heinrich for not inquiring further as to the requirements of a program about which he was never given notice. (Pet. App. 5a.)

Shortly after the Seventh Circuit issued its ruling in this case, this Court decided *Rapanos*. Thereafter, Mr. Heinrich filed a petition for rehearing and suggestion of rehearing en banc. Mr. Heinrich asked the Seventh Circuit to remand this case to the District Court to determine whether the Corps had jurisdiction over his property under *Rapanos*. In raising this question, Mr. Heinrich argued that this issue went beyond the Corps' jurisdiction under the Clean Water Act and extended to whether the District Court had subject matter jurisdiction in this case. Mr. Heinrich further argued that rehearing was warranted because the Seventh Circuit failed to consider the due process implications of the Corps' failure to notify him that an individual water quality certification would be required for his project. The Seventh Circuit denied Mr. Heinrich's petition for rehearing without comment. (Pet. App. 43–44a.)

REASONS FOR GRANTING THE WRIT

The Seventh Circuit decided this case a matter of days before this Court decided *Rapanos*. When Mr. Heinrich sought rehearing based on *Rapanos*, the Seventh Circuit denied his petition without comment.

In *Rapanos*, the Court granted certiorari to determine the proper sweep of the Clean Water Act, and to put to rest a persistent conflict among the lower federal courts on that issue. This Court's decision in *Rapanos* failed to achieve that objective, and the case law since *Rapanos* is no more coherent than was the case law that preceded it. Moreover, if the Seventh Circuit's understanding is correct as to Congress's intent and the proper construction of the relevant regulation, a serious question is presented as to the power of Congress to enact this scheme under the Commerce Clause. This case affords another opportunity for this Court to resolve these important issues of federal law.

In addition, Mr. Heinrich has raised an important due process claim in this case, based on the Corps' decision to sanction him (and the District Court's affirmance of that sanction), founded on a determination that, notwithstanding his satisfaction of the requirements of the Corps' NWP 26, he violated the law by failing to secure a state permit, which requirement was neither published generally nor conveyed to him personally. Indeed, neither Mr. Heinrich nor anyone else could have known unless they had access to the correspondence or files of state and federal officials, which obviously was not the case.

Compliance with the complex mosaic of state and federal statutes and regulations which govern this area of the law is challenging enough without attempting to impose unconstitutional penalties for noncompliance with secret law, as the Corps and the District Court did here.

The petition for a writ of certiorari should be granted and the case set down for plenary consideration. In the alternative, the Court may wish to grant the petition, vacate the judgment, and remand to the Seventh Circuit for further consideration in light of *Rapanos*.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A PERSISTENT CONFLICT AMONG THE LOWER FEDERAL COURTS AS TO THE APPROPRIATE STANDARD FOR DETERMINING WHETHER PROPERTY FALLS WITHIN THE JURISDICTION OF THE CLEAN WATER ACT.

Prior to this Court's decision in *Rapanos*, the lower federal courts were split as to the proper construction of the term "waters of the United States," as it applies to wetlands. *See, e.g., Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1154-57 (9th Cir. 2005), *cert. denied*, 2007 WL 506046 (2007); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 417 (4th Cir. 2003), *cert.*

denied, 541 U.S. 972 (2004); *United States v. Rueth Development Co.*, 335 F.3d 598, 604 (7th Cir. 2003), *cert. denied*, 540 U.S. 1050 (2003); and *In re Needham*, 354 F.3d 340, 345-6 (5th Cir. 2003).[8] In *Rapanos*, this Court attempted to reach agreement on that issue, but failed to do so. As the Chief Justice noted in his concurrence in *Rapanos*, the Court's failure to resolve the issue in that case was not likely to ease the conflict or ameliorate the confusion already existing in the lower federal courts. 126 S.Ct. at 2236 (Roberts, C. J., concurring). Specifically, the Chief Justice predicted that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* That, indeed, has proved to be the case.

The question that now divides the federal courts is whether (1) to apply the test endorsed by the plurality in *Rapanos*, that is, a mere surface water connection

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[8] When it rejected Mr. Heinrich's jurisdictional argument, the District Court held, based on a strict reading of the regulatory definition of "waters of the United States," and this Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985), that Mr. Heinrich's wetland constituted "waters of the United States." But the regulatory definition of "waters of the United States" and the decision in *Riverside* lack vitality after *Rapanos*. Although Mr. Heinrich raised this issue in the District Court, he admittedly failed to raise it in the Seventh Circuit until he filed his petition for rehearing, following the announcement of this Court's decision in *Rapanos*. Mr. Heinrich recognizes that an argument could be made that the issue was waived for this reason. Mr. Heinrich respectfully submits that this waiver argument lacks merit, however, because the issue is jurisdictional (*see* pages 21-22, *infra*), and one that may therefore be raised at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Even if the issue were not jurisdictional in the strictest sense, however, the Court would nonetheless have the power to grant certiorari and would be fully justified in doing so in this case. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991); *Carlson v. Green*, 446 U.S. 1417 n. 2 (1980); and *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The same is true with respect to the arguments set forth in Part III of this Petition. *See* pages 23-24, *infra*.

requirement (126 S.Ct. at 2226-27); (2) to apply Justice Kennedy's "significant nexus" test (126 S.Ct. at 2448 (Kennedy, J., concurring)); (3) to accept the dissenting Justices' invitation to choose either the surface water connection or significant nexus test, as the case may be (126 S.Ct. at 2265 (Stevens, J., dissenting); or, alternatively, (4) to accept Chief Justice Roberts' case-by-case approach (126 S.Ct. at 2236 (Roberts, C. J., concurring).

In *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1025 (9th Cir. 2006), the Ninth Circuit chose to follow Justice Kennedy's significant nexus test. The Seventh Circuit, in *United States v. Gerke Excavating*, 464 F.3d 723, 724-5 (7th Cir. 2006), *rehearing and rehearing en banc denied* (Dec. 1, 2006), also adopted Justice Kennedy's test, finding it to be the narrowest common ground under *Marks v. United States*, 430 U.S. 188 (1977). On the other hand, the First Circuit has chosen to follow the approach of the dissenting Justices, stating that "the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality." *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006).

The district courts also have split on how to decide this issue. As the First Circuit has noted (*see United States v. Johnson*, 467 F.3d at 60-61), the Middle District of Florida also has adopted the dissenting Justices' approach in *United States v. Evans*, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006). On the other hand, the Northern District of Texas indicated, in *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006), that it saw no alternative to following the "case-by-case" approach anticipated by the Chief Justice's concurring opinion in *Rapanos*.

This case presents the Court with an opportunity to resolve this conflict, inasmuch as the outcome could well

depend on the test to be applied. For example, if this Court were to apply the test articulated by Justice Kennedy, it would need to determine whether Mr. Heinrich's wetlands:

> [E]ither alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

Rapanos, 126 S.Ct. at 2248 (Kennedy, J., concurring). In clarifying this standard, Justice Kennedy added that "[w]hen, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Under the test articulated by Justice Scalia, two factors are relevant:

> First, that the adjacent channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

126 S.Ct. at 2226.

In the present case, Mr. Heinrich's wetland lies above the headwaters, meaning that the flow of water is minimal, and it is connected to navigable-in-fact waters only through a series of waterways many miles long. (Dkt. 34 (Affidavit of B. D. Simon), ¶ 23; Dkt. 104 (Deposition of M. O'Keefe), p. 14, lns. 9-15.) Moreover, there exists a clear demarcation between Mr. Heinrich's wetland and Little Star Lake as the wetland lies above the ordinary high water mark of the lake. (*Id.*) As a result, it is unlikely this Court would find that Mr. Heinrich's wetland has any significant impact, or any

impact whatsoever, sufficient to bring these wetlands into the realm of "navigable waters" under Justice Kennedy's test. Nor is it likely that this wetland could satisfy the two factors required under the plurality's test. Without clarification by this Court, however, there is no way for regulators, let alone landowners, to know which is the applicable test, or what is the proper result.

In sum, the conflict that motivated this Court to grant certiorari in *Rapanos* was real; it still exists; and it will continue to exist until this Court, once and for all, settles this important issue by fulfilling the Court's historic obligation "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court should therefore grant certiorari in this case.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER "WATERS OF THE UNITED STATES" IS JURISDICTIONAL OR MERELY AN ELEMENT OF A CLEAN WATER ACT VIOLATION.

The Seventh Circuit, without comment, denied the petition for rehearing and suggestion of rehearing en banc that Mr. Heinrich filed shortly after this Court announced its decision in *Rapanos*. In his rehearing petition, Mr. Heinrich raised the issue of subject matter jurisdiction, which may, of course, be raised by any party or court at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

In its response to the petition for rehearing, the government argued that the issue was not jurisdictional; but that, too, is an issue on which the lower federal courts are divided. Whether the "waters of the United States" requirement is jurisdictional, or simply an element of a Clean Water Act claim, is an important question of federal law to which this Court has not yet spoken.

In *United States v. Krilich*, 209 F.3d 968, 973 (7th Cir. 2000) *cert. denied*, 531 U.S. 992 (2000), the Seventh Circuit held that the "waters of the United States" requirement is not jurisdictional. In *Hartsell v. Eidson*, 127 F.3d 343, 349 (4th Cir. 1997) *cert. denied*, 523 U.S. 1030 (1998), *rehearing denied*, 523 U.S. 1113 (1998), however, the Fourth Circuit analyzed whether sewer systems were "waters of the United States" under the Clean Water Act to determine whether the district court had subject matter jurisdiction.

The district courts have likewise split on this important issue. *See, e.g., United States v. Interstate General Co.*, 152 F. Supp. 2d 843, 849 (D.Md. 2001), *aff'd.* 39 Fed. Appx. 870 (4th Cir. 2002) (whether property was "navigable waters" or abutted "navigable waters" is not a matter of subject matter jurisdiction); and *Patterson Farm, Inc. v. City of Britton*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998) (no subject matter jurisdiction where the water at issue did not constitute "navigable waters.").

Particularly given the lack of clarity concerning the proper definition of "waters of the United States" that persists in the wake of *Rapanos*, the question whether that term sets a jurisdictional requirement for federal administrative or judicial action, or simply is an element of a Clean Water Act violation, is an important and unsettled question of federal law warranting resolution by this Court.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE EXTENSION OF CLEAN WATER ACT JURISDICTION TO PRIVATE WETLANDS BASED ON MERE ADJACENCY, AND IN THE ABSENCE OF ANY SUBSTANTIAL CONNECTION WITH, OR IMPACT UPON, NAVIGABLE WATERS, EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Mr. Heinrich's attempt to build a grass-covered private road across his private wetland was deemed by the Seventh Circuit to have minimal impact on the environment, and thus to be permissible under NWP 26 itself. In addition, the wetland, by virtue of its location above local headwaters and the high water mark of a neighboring lake, has no substantial connection with, or impact upon, navigable waters. The wetland in this case is not navigable water, nor does it abut traditionally navigable waters. Congress already has made that determination with respect to the waters in this area. 33 U.S.C. § 59aa (1990). Moreover, even the non-navigable waters the wetland abuts are separated from "navigable-in-fact" waterways by miles of non-navigable waterways which eventually reach the Wisconsin River. (Dkt. 34 (Affidavit of B.D. Simon); ¶¶ 33-38.) .

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court invalidated the migratory bird rule. Although the Court did not reach the Commerce Clause issue in *SWANCC*, the Court acknowledged the "significant constitutional issues" raised by the Corps' extension of jurisdiction, and the Court referred to its earlier decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), noting that "[t]wice in the past six years we have reaffirmed the proposition that the

grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Id.* at 173.

Congress may legislate under the Commerce Clause only with respect to channels and instrumentalities of interstate commerce and to activities that "substantially affect" interstate commerce. *See United States v. Lopez*, 514 U.S. at 558-9. Moreover, federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce requires (the only conceivable basis for regulation here) "some sort of economic endeavor." *United States v. Morrison*, 529 U.S. at 611. The discharge of fill material into remote wetlands does not satisfy the "economic endeavor" test.

Nor does the statutory and regulatory scheme provide for any case-by-case inquiry as to a potential interstate effect of the prohibited activity. If it did, that might save its constitutionality; but no such mechanism exists here. *See United States v. Lopez*, 514 U.S. at 560 (providing an exception to the test where the statute "ensure[s], through case-by-case inquiry, that the [activity] affects interstate commerce.").

The lack of substantial connection to, or impact upon, interstate commerce in this case is extreme. Indeed, to contend that Mr. Heinrich's grass-covered road "substantially affects" interstate commerce (the only Commerce Clause test arguably implicated here) is not far short of the time-worn witticism that Justice Story's view of admiralty jurisdiction was so extensive as to be satisfied by a corn cob floating in a bucket of water. *See* Note, *Extension of Federal Jurisdiction over State Canals*, 37 Am.L.Rev. 911, 916 (1903).

In sum, the extension of jurisdiction over remote wetlands such as Mr. Heinrich's is improper under the Commerce Clause, and this case warrants review for that reason as well.

IV. THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR THAT, EVEN IN THE ADMITTEDLY COMPLEX AREA OF ENVIRONMENTAL REGULATION, THE DUE PROCESS CLAUSE REQUIRES NOTICE OF RELEVANT REQUIREMENTS AND FORBIDS PUNISHMENT BASED ON SECRET LAW.

At a minimum, the Due Process Clause of the Fifth Amendment requires that citizens be given notice as to what the law requires them to do, or refrain from doing, before they may be punished for any such acts or omissions. *See, e.g., United States v. Lanier*, 520 U.S. 259, 265-267 (1997); *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). *See also BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (applying concept of fair notice as a tenet of due process to civil matters); *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995) (same). What the due process clause prohibits, above all else, is the meting out of punishment for violations of secret law. But that is precisely what the record in this case shows. Here, Mr. Heinrich did not receive notice of the requirement that he obtain an individual state water quality certification prior to acting under NWP 26, but he was punished for failing to do so.[9]

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[9] The government undoubtedly will argue that Mr. Heinrich failed to raise a due process argument below. However, Mr. Heinrich has consistently challenged the adequacy of the notice he received with respect to the alleged illegality of his actions and omissions. *See, e.g.*, Dkt. 55 (Response to Proposed Summary Judgment Findings and Conclusions by Heinrich); Dkt. 98 (Motion by Heinrich to Reconsider Ruling on Government Motion for Partial Summary Judgment); Dkt. 124 (Brief in Opposition by Heinrich to Motion in Limine Regarding Options); Appellant's Initial Brief on Appeal, p. 24-31; and Appellant's Reply Brief on Appeal, p. 10-12.

As the Seventh Circuit acknowledged, Mr. Heinrich's activities were sufficiently minor to fall within the range of activities allowed under NWP 26. (Pet. App. 2a–3a.) However, the Seventh Circuit ruled against Mr. Heinrich because it accepted the government's argument that Mr. Heinrich was also required to obtain an individual water quality certification from the State of Wisconsin. But there was no such published requirement, and Mr. Heinrich was not given notice of any such requirement in any form, before he was punished for failing to comply with it.

At the time Mr. Heinrich planned and built his road, the regulatory framework surrounding wetlands and the legality of activities associated with wetlands was unclear. The Corps was in the midst of issuing and re-issuing nationwide permits, and the State of Wisconsin was in the midst of making similar determinations concerning state water quality certifications.

When NWP 26 was finally promulgated, it was not clear whether Wisconsin would accept it. Wisconsin did not reject it, but purported to accept it with exceptions. While the Corps eventually chose to treat Wisconsin's action as a constructive rejection (which thus triggered the state certificate requirement), the Corps announced that determination only in a letter to the State; the decision was not published, and the public was not otherwise notified. In short, whether Mr. Heinrich (or anyone else in Wisconsin) would be required to do something more than simply satisfy the requirements of NWP 26 (that is, also secure a state certificate) depended on the result of non-public interactions between the state and federal governments, but public notice as to the results of those interactions was never given. (Dkt.

103 (Deposition of R. Augustin), p. 36, ln. 19; p. 37, ln. 20.)[10]

In the regulatory context, due process requires that parties have fair notice of what is required of them. Absent fair notice, citizens cannot be penalized for non-compliance. *See, e.g., Trinity Broadcasting of Florida, Inc. v. Federal Communications Commission*, 211 F.3d 618, 628 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-57 (D.C. Cir. 1998); *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d 1324.

The key inquiry is "whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d at 1329.

The Corps' regulations also require that it take "appropriate measures" to inform the public as to whether an individual water quality certification is required to take advantage of a nationwide permit. 33 C.F.R. § 330.4(c)(4). While the Seventh Circuit stated that "[w]e might agree with Heinrich that Corps officials should have done more to let those potentially affected by the Wisconsin decision know that they had to get individual certifications," the court erroneously concluded that the Corps' failure to do so was not a legal or constitutional violation.

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[10] State water quality certification is central to the question whether an individual water quality certification is required prior to engaging in an activity under the nationwide permit program. 33 C.F.R. § 330.4(c).

The Seventh Circuit gave short shrift to due process, apparently choosing to find fault with Mr. Heinrich for not reading the regulations. But Mr. Heinrich did read the regulations. The problem is that the regulations did not put him on notice that an individual water quality certification was required.[11] The only thing that would have put Mr. Heinrich on notice of that requirement was the Corps' letter determination, which was sent to the State of Wisconsin, but neither published nor made publicly available. That is why Mr. Heinrich's punishment is predicated upon secret law.

The government also has suggested that the Corps' failure to comply with the Constitution, as well as its own regulations, is immaterial, because Mr. Heinrich's conversations with regulators provided an appropriate substitute. There is no evidence to show that those conversations involved any discussion about the intersection of NWP 26 and any individual water quality certification requirements. Indeed, it is undisputed that the NWP 26 was simply never discussed. (Dkt. 104 (Deposition of M. O'Keefe), p. 99, lns. 6-9, pg. 104, lns 12-17.)

When a citizen cannot rely on the notice requirements stated in the applicable regulations, he is left in the dark as to what is required of him. That is what happened here, and it cannot, consistent with due process, provide a basis for punishment.

CONCLUSION

Mr. Heinrich has presented four issues, all of which warrant plenary review by this Court. First, there are few

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[11] Indeed, what Mr. Heinrich (but not the Corps) did learn from those regulations is that the Corps is affirmatively required to inform the public as to when an individual water quality certification is necessary. That, of course, it did not do.

issues of greater practical importance to our federal system than ascertaining the proper standard for determining whether wetlands constitute "waters of the United States." Depending on the standard chosen, vast amounts of land previously subject to state control may become subject to pervasive federal regulation. Second, the proper characterization of the "waters of the United States" requirement – whether jurisdictional or merely an element of the claim – is an equally important question, and one as to which the lower courts are also divided. Third, whether the broad extension of the Clean Water Act championed by the government would exceed the power of Congress under the Commerce Clause is also an important question warranting review. Finally, whether, in this decidedly complex area of the law, the government may impose punishment for "violations" of unannounced requirements, is an important question worthy of review by this Court.

Mr. Heinrich respectfully submits that each of these issues warrants plenary review by this Court. In the alternative, Mr. Heinrich respectfully suggests that, in view of the Seventh Circuit's failure to consider the relevance to this case of the Court's decision in *Rapanos*, the Court may wish to vacate the judgment and remand the case for further consideration in light of *Rapanos*.

Respectfully submitted,

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March 16, 2007

APPENDIX

Appendix A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued April 14, 2006
Decided June 6, 2006

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-3199

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Western District of Wisconsin
v.	No. 03 C 75
PAUL A. HEINRICH, *Defendant-Appellant.*	John C. Shabaz, *Judge.*

ORDER

Paul Heinrich owns nine and a half acres of land on Little Star Lake in northern Wisconsin. A licensed pilot, Heinrich uses the property to operate a business offering "scenic seaplane rides." Most of his land is a white cedar swamp wetland subject to state and federal regulations.

Heinrich's problems began when he decided he wanted to build a road from the lake upland to an aircraft hangar on his property. Starting in 1996, he began making inquiries of various officials with the Wisconsin Department of Natural Resources (WDNR) and the Army Corps of Engineers. At first he was honest about needing to build the road to move his seaplane. When he was told he would be unlikely to get the necessary permits, Heinrich changed his story and said he planned to build a "logging road," which is subject to fewer restrictions. But a Corps official who visited the property in May 1997 told Heinrich that idea also was unlikely to fly.

In August 1997, Heinrich chose to go ahead and build the road anyway, misrepresenting to his contractor that he had the necessary approvals. Two years later, officials received a complaint, and the federal EPA began investigating. Heinrich continued to characterize the project as a "logging road" on his "silviculture hobby farm." The EPA ordered Heinrich to restore the wetlands, and when he didn't, the agency issued a notice of violation. The government eventually filed suit to enforce the order. The district court, after granting summary judgment for the government, imposed a monetary penalty and issued a remedial order. Heinrich appeals, and we review the statutory interpretation behind the district court's summary judgment decision *de novo*. *United States v. B & W Inv. Props.*, 38 F.3d 362, 366 (7th Cir. 1994).

Heinrich's seaplane access road met the criteria of a Corps nationwide permit that was in effect at the time,

known as "NWP 26," which allowed small projects like his with minimal environmental impacts to proceed without advance federal approval. *See* 33 U.S.C. § 1344(e). However, under NWP 26, projects like Heinrich's still needed a state water quality certification. *See* 33 C.F.R. § 330.4(c).

Heinrich's defense boils down to two arguments: that Wisconsin waived its right to require water quality certification for NWP 26 projects, or that because of bureaucratic snafus between the Corps and the WDNR, he did not get proper notice that certification was required. We must reject both arguments.

Federal regulations require that a state evaluate a Corps nationwide permit for compliance with its water quality standards. 33 C.F.R. § 330.4(c)(1). If a state denies blanket water quality certification for a particular NWP, or if the Corps deems the conditions imposed by a state to be the equivalent of a denial, then individuals seeking to proceed under a NWP must obtain individual water quality certifications.

Heinrich contends that Wisconsin waived its right to require individual water quality certifications because it did not submit valid paperwork to the Corps in time for a February 11, 1997, deadline applicable to NWPs in effect for the year 1997. The record indicates that the Corps received a FAXed copy of Wisconsin's water quality decision on the deadline, though Heinrich disputes whether the state properly followed its own procedures to make the decision legally effective by that date. At the latest, it appears the decision would have become effective on March 29, 1997, after the state commend period closed. The Corps did not reject the state's submission as untimely.

Heinrich did not raise his state procedural arguments in the district court, and so we decline to address them on

appeal. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004) ("We have long refused to consider arguments that were not presented to the district court in response to summary judgment motions. Appellate review is not designed to serve as an unsuccessful party's second bite at the apple -- an opportunity to raise issues and arguments that were not brought forth below." (Internal citations and quotation marks omitted.)). Suffice it to say that while Wisconsin may or may not have blown a deadline set by the Corps, the Clean Water Act, which is the controlling statute here, imposes a penalty of waiver only if a state fails to act "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). Since the Corps issued its request for state certifications on December 13, 1996, and Wisconsin's certification was effective at the latest on March 29, 1997, the state was within the one-year statutory time frame. Heinrich cannot escape liability for his wetlands violation by arguing in retrospect that the State waived certification.

Although the Corps accepted the state's decision as timely, it determined on April 30, 1997, that the substance of Wisconsin's decision was inconsistent with the Corps' regulations, and the decision was thus interpreted as a denial of NWP certification. This meant that each applicant seeking to use NWP 26 in the state would have to obtain an individual state water quality certification. Heinrich believes the requirement should not have been applied to him because there was no official public notice, to him or anyone else, that the Corps had interpreted the state's decision as a denial of blanket certification and thus that individual water quality certifications would be needed.

The relevant regulation says only (and rather vaguely) that Corps district engineers "will take appropriate measures to inform the public of which activities, waterbodies, or

regions require an individual ... water quality certification before authorization by NWP." 33 C.F.R. § 330.4(c)(4). We might agree with Heinrich that Corps officials should have done more to let those potentially affected by the Wisconsin decision know that they had to get individual certifications. But we cannot find that the Corps' failure to do so violated any statute or regulation requiring notice by publication.

By contrast, the regulations are clear that an individual water quality certification is required where a state has denied blanket certification under a particular NWP. 33 C.F.R. § 330.4(c)(6). Nowhere do the regulations indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise. Yet Heinrich, who has reminded us throughout his brief and oral argument that he is a practicing attorney, seems to assume that he had a legal right to go forward with his access road simply because no one ever told him he couldn't. Rather than looking in vain for post-hoc justifications, he should have read the appropriate regulations more carefully and inquired about the status of state water quality certification requirements before he cavalierly moved forward with his project. The record indicates that Heinrich had contacts with various officials who probably could have steered him in the right direction and saved him an expensive violation -- if he hadn't created confusion by trying to flimflam them into believing that his seaplane access road was actually a "logging road," the requirements for which are covered by different policies.

Heinrich also seeks to have the government's suit against him dismissed because he was not personally served with the EPA compliance order. (He got it by certified mail.) As legal authority, he cites cases dealing with statutory requirements concerning notice of a citizen's intent to sue to enforce a government regulation, *see Hallstrom v. Tillamook*

County, 493 U.S. 20 (1989), or over a government official's failure to perform some act or duty, *see Greene v. Reilly*, 956 F.2d 593 (6th Cir. 1992). But these cases have nothing to do with the mode by which an EPA administrative order is served. While the Clean Water Act specifies that such orders "shall be by personal service," 33 U.S.C. § 1319(a)(5), the record shows that Heinrich received the order, responded to it without objecting to the mode of service, and was not prejudiced by the absence of personal service. The district court did not err in finding that Heinrich thus waived strict compliance with the personal service requirement. *See United States v. Myslajek*, 568 F.2d 55, 57 (8th Cir. 1977).

Finally, Heinrich argues that the $75,000 penalty he was assessed, along with an order to restore his wetlands to their previous condition, were "draconian and an abuse of discretion." Our own review of the record satisfies us that the district court properly considered the relief requested by the government and Heinrich's objections to it.

The judgment of the district court is AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL A. HEINRICH,

Defendant.

SECOND AMENDED JUDGMENT IN A CIVIL CASE

Case No.: 03-C-075-S

This action came for consideration before the court with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF AGAINST DEFENDANT WITH COSTS RESTRAINING AND ENJOINING DEFENDANT FROM FURTHER VIOLATIONS OF THE CLEAN WATER ACT IN THE AREA DESCRIBED AS FOLLOWS: A SITE SITUATED IN THE NORTHWEST 1/4, SECTION 10, TOWNSHIP 41 NORTH, RANGE 8 EAST, STAR LAKE, VILAS COUNTY, WISCONSIN CONTAINING

WETLANDS CONSISTING OF WHITE CEDAR SWAMP; AND THAT DEFENDANT FULLY RESTORE SAID WETLANDS TO THEIR PRE CLEAN WATER ACT VIOLATION CONDITION IN ACCORDANCE WITH THE COURT'S APPROVED RESTORATION PLAN ATTACHED HERETO AS EXHIBIT A.

THAT IN THE EVENT ANY RESTORATION REQUIREMENT IS NOT COMPLETED BY DEFENDANT BEFORE THE DATES SET FORTH IN THE COURT'S APPROVED RESTORATION PLAN DEFENDANT SHALL BE LIABLE FOR PAYMENT OF NOT MORE THAN $1,000.00 PER DAY AS DETERMINED BY THE COURT FOR EACH DAY THE RESTORATION PLAN REQUIREMENT IS NOT COMPLETED AFTER SAID DATE;

THAT DEFENDANT PAY THE BALANCE OUTSTANDING OF THE $75,000 CIVIL PENALTY PREVIOUSLY ORDERED IN THIS MATTER AS FOLLOWS:

$16,250 NOT LATER THAN JANUARY 5, 2006

$16,250 NOT LATER THAN JANUARY 5, 2007

$16,000 NOT LATER THAN JANUARY 5, 2008

FOR A BALANCE OF $48,500

IT IS FURTHER ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF UNITED STATES OF AMERICA AGAINST DEFENDANT PAUL A. HEINRICH DISMISSING ALL COUNTERCLAIMS WITH PREJUDICE AND COSTS.

Approved as to form this 17th day of June, 2005.

s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

s/ Theresa M. Owens
Theresa M. Owens, Clerk

s/ L. Jensen June 17, 2005
By Deputy Clerk

O3-C-75-S

EXHIBIT A

COURT APPROVED RESTORATION PLAN FOR DEFENDANT HEINRICH'S WHITE CEDAR SWAMP

The Court has ordered full restoration of Defendant's property on Little Star Lake, Wisconsin (the "site") to its pre-violation conditions consistent with EPA's Restoration Guidelines. Pre-violation conditions were a White Cedar and Black Spruce dominated forested wetland system. Therefore, once fill removal is completed, trees must be planted.

Wetland restoration of the site will consist of removal of fill material, reconstruction or relayering of the natural soil horizons, best management practices prior to, during and after construction (*e.g.*, erosion control), seeding and planting of native wetland plant species, including trees and herbaceous plants, and a period of monitoring and corrective action to ensure successful establishment of pre-violation conditions. The goal of restoration is to reestablish a forested wetland system that mimics the elevation, soil layering and plant community of the surrounding undisturbed white cedar swamp. A detailed restoration plan follows consistent with the Restoration Guidelines.

I. Existing Physical Conditions

A. Surveyed Site Plan. No later than ten days after the Court approves this Restoration Plan Defendant Heinrich shall provide to EPA a surveyed site plan showing property boundaries, buildings, water bodies, wetlands, areas of unpermitted fill, elevation contours and other ground surface features at a scale of 1 inch = 25 feet.

Prior to commencement of earth moving Defendant Heinrich shall take spot elevations in undisturbed soil

conditions on either side of the road fill. Spot elevations are necessary to guide earthmoving work so the finished grade approximates the pre-violation ground surface by mirroring the elevations of the adjacent undisturbed wetland. The spot elevations shall total at least 20 (10 on either side of the road fill) beginning at the lakeshore and proceeding on either side of the road fill at about 30 foot intervals. The spot elevations data shall be added to the surveyed site plan prior to the commencement of earth moving and provided EPA.

B. (1) Size and Type of Unpermitted Fill. The approximate length of the unpermitted road fill is 375.5 feet. Most of the unpermitted road fill is approximately 20 feet wide with the exception of a 61 foot long upland island. At its upper end the unpermitted road fill flares to 52 feet wide. The unpermitted road fill has a variable depth ranging from 2 1/2 inches to 5 feet. The average depth of the unpermitted road fill is 22 inches. The unpermitted road fill includes a section covered by an 82 foot long boardwalk from the lake. The remainder of the road is grass covered. Most of the fill underneath the boardwalk consists of a layer of organic soils and debris. The fill in the grass-covered section of the seaplane access road consists of a 3 to 5 inch layer of organic soils over a thicker layer of sand fill.

(2) Description of the Wetland. Little Star Lake in Vilas County, Wisconsin, is a drainage lake approximately 93 acres in size with a maximum depth of 9 feet. An outlet drains the lake to the south to Star Lake. Little Star Lake, a navigable water body, drains into the Wisconsin and Mississippi Rivers which are both interstate water bodies. The site is located on Defendant Heinrich's 9.5 acres of private property, NE 1/4, Section 10, Township 41 North, Range East, Star Lake, Vilas County, WI. The western edge of Little Star Lake consists of muck soils of the Seelyeville series and sandy soils of the Rubicon series. Seelyeville.

mucks are very poorly drained soils, with moderately rapid permeability that formed on outwash plains and glacial lake plains.

These black mucks are made of herbaceous organic matter, are subject to ponding and the water table is at or near the surface throughout the year. Rubicon sands are excessively drained soils that formed on glacial outwash plains. The subject wetland is identified on the Wisconsin DNR Wetland Inventory as Forested-Needle Leaved Wet soil, Palustrine. This coniferous wetland is dominated by black spruce (Picea mariana) and northern white cedar (Thuja occidentalis). A more complete list of native herbaceous plant and tree species appears in Section II.

II. Proposed Physical Conditions

A. Surveyed Site Plan of Proposed Physical Conditions. No later than ten days after the Court approves this Restoration Plan Defendant Heinrich shall, using the site plan described in I.A as a base, show the areas where he will do the removal and restoration. These areas shall include all areas of unpermitted fill consistent with the description in Section I.B. In addition, Heinrich shall show proposed finished grades, the location of proposed planting or seeding and the location of all silt fences.

B. Description of Removal and Restoration Work. All unpermitted fill shall be removed and restored. To the maximum extent possible excavated areas shall be restored with the original organic soils removed or used during road construction as fill. If there is a deficit of organic soils for full restoration after best efforts have been made to use all original organic soil, then organic soils for restoration shall be purchased commercially.

(1) Methods and Equipment. Heavy equipment must be tracked. Tracked rather than wheeled vehicles

minimize soil disturbance during work and are less likely to fail. Equipment shall access the site from the Defendant's upland area near his hangar building and be stored there when not in use. Equipment shall remain on the fill pad when working to the maximum extent possible. Mats may be necessary for equipment access to the restored area once the fill removal is complete and soil reconstruction and soil ripping commence.

Survey equipment, used by licensed and professional land surveyors, will establish the spot elevations on either side of the roadway fill. Twenty locations equally spaced on either side of the roadway fill will be marked with lath and elevations marked thereon.

An on-site construction supervisor, with experience in soil science and wetland restoration, will be present periodically to assist equipment operators to reestablish ~~soil~~ profiles and grades.

(2) Schedule of How Work Will Progress Across the Site. Work will occur in phases. The first phase will be restoration of the section of ground between the shoreline and the upland island. The second phase of restoration will be in the area between the upland island and the staging area. Phased work will allow a determination of whether initial methods of fill removal and reconstruction of soil profiles and grades are successful or need adjustment.

Work will progress as follows:

1. Place erosion control barrier at the lake shoreline and maintain throughout the restoration process until vegetation is sufficiently established to eliminate sheet or gully erosion from rain or melt events.

2. Scrape the thin top layer of organic fill from the roadway and stockpile at the upland island.

3 Remove the boardwalk and properly dispose of the lumber.

4. Working off the sand fill at the landward edge of where the boardwalk was, use excavator bucket to scrape organic fill from this area and stockpile at the upland island. Remove and properly dispose of the sand fill from beneath the boardwalk.

5. Continue removing sand fill from the area between the landward edge of the boardwalk and the upland island - properly disposing of the sand fill material.

6. Determine the amount of organic soil that must be replaced, if any, within the area of fill removal. This determination must account for soil ripping. Accordingly, in this area of fill removal, soil ripping may need to occur at this time.

7. If necessary, place organic soil previously removed back into fill removal area to reconstruct soil profiles and to meet the grade of the adjacent undisturbed wetland areas. Survey equipment to match grades will be necessary on-site at this time. If fill removal is complete and soil profiles and grades are sufficient then organic erosion control mats shall be immediately placed, secured and maintained.

8. Continue the process of fill removal, soil reconstruction and grade matching while moving landward towards the hangar upland area. If it appears prudent, soil ripping may occur in smaller segments and organic erosion control mats can be placed assuming soil profile reconstruction and grades are sufficient. Whatever soil is stockpiled on the upland island may need to be moved and temporarily stockpiled further along the roadway or

moved completely to the hangar upland area or some combination thereof.

9. The placement of additional erosion control barriers across the roadway while the work is ongoing is dependent on the work phasing. If smaller segments of the restored roadway are not covered by organic mats and the raw earth will be exposed to the elements for greater than two days, then an erosion control barrier will be placed at 75 and 150 feet landward of the upland island. This will prevent erosion events in the interim time period between initiation and completion of fill removal and soil profile reconstruction.

10. When fill removal work is nearing 95% complete U.S. EPA will be contacted for a restoration plan compliance inspection to ensure soil profiles, grades, and fill removal are adequate. A surveyor will be on-site to assist in documenting grades. U.S. EPA or their representatives are encouraged to inspect the site as early and as often as possible to prevent redoing work.

11. After completion of fill removal and soil profile reconstruction a final erosion control barrier will be placed at the interface between the restored wetland area and the hangar upland area.

12. Within 15 days of completion of earth moving activities an as-built plan will be prepared that depicts the spot elevation grades of 10 points within the restored area that match with the twenty spot elevation controls in the adjacent undisturbed areas.

13. EPA, within 20 days of receipt of the as-built plan, will notify the Defendant in writing that earthwork is complete. At receipt of this letter Defendant shall

begin seeding and planting according to the following time frames.

14. Trees are to be planted on seven (7) foot centers - meaning one tree per 49 square feet of restored area. Trees seven (7) feet or taller are preferred because they will lead to quicker and more successful restoration. The tree species to be planted are identified in Section II.B(3). Since Black Spruce and Northern White Cedar are the dominant species of trees, they should comprise 50% to 75% of the total percentage of trees planted. The remaining percentage should include a representative mix of the other listed tree species. Of every five (5) dominant trees planted three should be Northern White Cedar trees and two should be Black Spruce trees.

15. Alternatively, if small trees (less than seven feet tall) are planted, they shall be protected from deer browse by fencing and commercially available products such as tree tubes. Fencing and tree tubes must be maintained. Tree tubes may initially exceed the height of the small trees.

16. Trees will be mulched around their bases to a diameter of three (3) feet and a thickness of five (5) inches. The planting plan shall be illustrated on the surveyed site plan.

17. Herbaceous seeding will occur at a rate of 11 pounds per acre and will be hand broadcasted and raked into the soil surface to ensure good seed - soil contact. Seed type is limited to those species identified in the surrounding natural forested wetland areas and listed in Section II.B(3).

18. Herbaceous plant seeds will not be sown into the mulched tree areas. Local area nurseries and commercial seed sources shall be contacted immediately by Defendant upon the Court's approval of the restoration plan to ensure tree and seed availability. If availability is limited, then changes to the plant lists may be made only upon the prior written approval of EPA.

(3) List of Plant Species To Be Seeded or Planted.

Herbaceous plant species:

1. Tag Alder (*Alnus incana*)
2. Flat-Top Aster (*Aster umbellatus*)
3. Two-Seeded Bog Sedge (*Carex disperma*)
4. Greater Bladder Sedge (*Carex intumescens*)
5. Three-Seeded Bog Sedge (*Carex trisperma*)
6. Bunchberry (*Cornus canadensis*)
7. Oak Fern (*Gymnocarpiurn dryopteris*)
8. Canada Mayflower (*Maianthenum canadensis*)
9. Cinnamon Fern (*Osmunda cinnamomea*)
10. Royal Fern (*Osmunda regalis*)
11. Broad Beech-Fern (*Phegopteris onnectilis*)
12. Star Flower (*Trientalis borealis*)

Tree species:

1. Balsam Fir (*Abies balsamea*)
2. Black Ash (*Fraxinus nigra*)
3. Black Spruce (*Picea mariana*)
4. Northern White Cedar (*Thuja occidentalis*)
5. Yellow Birch (*Betula alleghansis*)

C. Outer Boundary of Construction Activities. No later than ten days after the Court approves this Restoration Plan Defendant Heinrich shall show, using the surveyed site plan as a base, the outer boundaries of construction activities

which includes the areas to be restored and silt fences. This boundary shall be marked with flags prior to commencement of earth moving work. No work shall occur beyond this boundary.

III. Actual Restored Physical Conditions After-Grading

After grading is complete spot elevations will be taken and recorded every 30 feet along the restored area of the road to verify the actual finished grade. Photographs of the finished restoration shall be taken to provide a record of the finished grade.

In addition to the spot elevations to verify the actual finished grade Defendant shall submit to EPA an as-built plan at the same scale as the base map, comparing not only the spot elevations inside and outside the restored area, but also the reconstructed soil profiles inside and outside the restoration area. The as-built plan shall demonstrate that the spot elevation grades of 10 points within the restored area match with the 20 spot elevations previously taken in the adjacent undisturbed areas. The as-built plan shall be prepared and submitted 15 days after the completion of earth moving work and prior to planting/seeding activities to allow for corrective earth work if necessary.

IV. Monitoring/Measures of Success

A. Measures of Success. The site must comply with the following performance standards for measuring the success of revegetation:

1. If the restoration area does not achieve 75% relative ground coverage of vegetation after three growing seasons; and/or 85% relative ground coverage of vegetation after five growing seasons; then

    a. the Site shall receive supplemental seeding or planting of plant plugs during each subsequent

spring planting season until the 75% or 85% relative ground coverage of vegetation standard is met;

2. If the restoration area does not achieve a 2% or less standard for the relative ground coverage of non native or invasive vegetation; then

   a. herbicide, mowing or hand pulling methods of invasive species plant control must be implemented immediately. Non native or invasive plant species are defined by Plants of the Chicago Region, (1994, Floyd Swink & Gerould Wilhelm) and include, but are not limited to *Phragmites australis, Lythrum salicaria, Phalaris arundinacea, Typha X glauca and Typha angustifalia*;

3. If the restoration area does not have at least 50% of the trees survive after the inspections are conducted in years three (3) or five (5), then replanting of tree species will occur in the dormant season of year three (3) and year five (5) until the numeric standard is obtained;

and

4. If performance standards are not met after the end of the five (5) year monitoring period, then corrective action necessary to achieve these performance standards and the monitoring to track performance will continue annually until the performance standards are met.

B. Monitoring Schedule. Monitoring inspections will begin in 2006 as described. The restoration areas shall be inspected twice annually for two growing seasons (on or about June 15 and September 15), and once annually for the successive three growing seasons (on or about August 1) to

assess the relative success or failure of the wetland plant community. Random sampling will be used to establish a permanent 300 foot transect within the restoration area. Vegetation sampling will be conducted every 10 feet (beginning at 0) using a square meter quadrat. Information collected within the quadrats will include species presence (i.e., genus and species is identified) and relative ground coverage of each identified species.

C. Monitoring Reports. Monitoring reports, documenting the previous growing season site inspection results, shall be submitted annually by October 1" (or the next business day if October 1 falls on a weekend or federal holiday) and include:

1. Written narrative characterizing general site conditions, including revegetation, soil stability and hydrology (i.e., the level of surface inundation or soil saturation to 20 inches below the ground surface);

2. Vegetation sampling results identifying species and relative ground coverage and a determination of compliance with performance standards; and

3. A permanent photographic record of the restoration area from each of its four corners. The monitoring reports shall be submitted to the following:

   Gregory Carlson (WW-16J)
   United States Environmental Protection Agency
   77 West Jackson Boulevard
   Chicago, IL 60604-3590

Leslie K. Herje
Assistant U.S. Attorney
Chief, Civil Division
U.S. Department of Justice
Suite 303, City Station
660 W. Washington Avenue
Madison, Wisconsin 53701-1585

After EPA has received and reviewed the Defendant's final monitoring report and has determined that all measures of success contained in the Restoration Plan have been attained and maintained, EPA shall issue a letter verifying that the monitoring portion of the Wetland Restoration project has been completed.

If at any time during the monitoring period EPA determines that any measures of success contained in the Restoration Plan are not being attained and/or maintained, EPA or Defendant may propose modifications to the Restoration Plan to correct the problem. The parties shall adopt and incorporate into the Restoration Plan whatever modification(s) EPA deems necessary to attain or maintain the measures of success. EPA or Defendant may propose modifications to the Restoration Plan. Modifications shall be incorporated into the Restoration Plan upon agreement of the parties and shall become effective without further action by the parties or the Court. The parties shall first attempt to resolve all disputes informally. After first conducting good faith efforts to resolve any dispute informally, either EPA or the Defendant may seek review from the Court.

V. Inspections

EPA may inspect the site at reasonable times upon notice to Defendant for the duration of the restoration work and monitoring period. Given the distance to the site from EPA's regional office in Chicago, EPA may designate another

person, agency or contractor to conduct site inspections upon reasonable notice to Defendant.

VI. Schedule

Earth moving work shall begin as soon as possible, weather permitting, but no later than July 19, 2005 and shall be completed by August 5, 2005. Seeding and planting shall begin not later than October 1, 2005 and be completed not later than October 15, 2005.

Improper Service

Finally, defendant suggests that the second claim of the complaint should be dismissed because he was not personally served with the compliance order plaintiff now seeks to enforce in accordance with 33 U.S.C. § 1319(a) (5)(A). Under the circumstances presented here, a failure of personal service is not fatal to plaintiff's claim. It is undisputed that defendant actually received the administrative compliance order and an amendment to it. It is also undisputed that he responded to the order without raising an objection to the mode of service. Pursuant to 33 U.S.C. 1319(a)(4) the order could not take effect until defendant had an opportunity to consult with plaintiff. As a result of these circumstances there is no possibility of prejudice to defendant from the absence of personal service.

Had defendant objected to the form of service at the time it could have been easily and inexpensively corrected. Having chosen not to do so and fully litigating the matter on its merits under circumstances where there is no evidence of bad faith on the part of plaintiff or prejudice to defendant, he has waived strict compliance with the personal service requirement. United States v. Myslajek, 568 F.2d 55, 57 (8th Cir. 1977).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment is GRANTED.

IT IS FURTHER. ORDERED that the parties submit proposed findings of fact and conclusions of law concerning that relief to be awarded by October 1, 2003.

Entered this 18th day of September, 2003.

BY THE COURT

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff, Case # 03-C-75-S

v. Memorandum and Order

PAUL A. HEINRICH,

Defendant.

Plaintiff United States of America commenced this Compliance Order enforcement action pursuant to § 309(a) of the Clean Water Act, 33 U.S.C. S 1319(a), seeking to recover civil penalties and compel defendant Paul Heinrich to restore a wetland through which he constructed a road. Defendant seeks a determination that his construction of the road was not in violation, or was exempt from or permitted by the CWA and further asserts various defenses to CWA enforcement. Jurisdiction is provided by 28 U.S.C. § 1331, 1345, 1355 and the CWA. The matter is presently before the Court on cross motions for summary judgment on all claims and defenses. The following facts are not disputed for purposes of the pending motions.

FACTS

Plaintiff Heinrich owns real property in Vilas County, Wisconsin consisting of 9.5 acres and 480 feet of frontage on Little Star Lake. The non-wetland portion of the defendant's property includes a house, garage and shed. It also includes a 60 x 68 foot storage building constructed by defendant. Eight of the 9.5 acres, including the lake frontage, are a white cedar swamp wetland. The cedar swamp slopes toward and is hydrologically connected to Little Star Lake. Little Star Lake has 100 surface acres and a maximum depth of nine feet. It is connected by surface water and drains into Star Lake and ultimately into the Wisconsin and Mississippi rivers.

Little Star lake is used for recreational purposes including fishing and boating. Errington's Resort, which offers cabins and a motel to interstate guests, has operated on Little Star Lake since 1950, The resort is open all year and its guests swim, boat, snowmobile and hunt on the lake.

Defendant Heinrich is a commercial pilot who owns a sea plane and operates a business called "Scenic SeaPlane Rides" which offers seaplane rides to customers. He stores his seaplane in the storage building on the property and takes off and lands the plane on Little Star Lake.

In December 1996 defendant contacted both the Wisconsin Department of Natural Resources (WDNR) and the Regulatory Project Manager for the United States Army Corps of Engineers (Corps) to inquire about constructing a road through the wetland for the purpose of moving his seaplane between the storage building on his property and Little Star Lake. Both the WDNR and the Corps advised defendant that he required permits to construct the road and the Corps agent advised defendant that he was unlikely to receive the necessary permits.

On January 16, 1997 defendant filed a permit application with the Corps to construct a "permanent logging road." The application showed that fill would be placed to construct a fifteen foot wide road and a twenty foot strip on either side of the road would be logged. A copy of the application was also received by the WDNR. On February 10, 1997 the Corps and WDNR inspected defendant's property. The Corps agent advised defendant to apply for an access path with a dual purpose. The WDNR agent advised defendant that WDNR would probably deny a request for certification pursuant to § 401 of the CWA.

On May 20, 1997 federal, state and county officials inspected defendant's property, The WDNR's agent advised plaintiff that in his opinion construction of the access road would involve the discharge of fill material into the wetland and would require a State Water Quality Certification pursuant to section 401 of the CWA. He further advised defendant that it was his opinion that the project would be unlikely to receive such a certification.

In 1997 defendant hired Vogel Enterprises, Inc (Vogel) to construct a road through the wetland, advising Vogel that he had obtained all necessary permits and that the road was exempt from permit requirements because it was a logging road. Using a backhoe, a bulldozer and a Posi Track with a bucket Vogel built the road by leveling the top of an existing ridge and pushing muck between the ridge and the area that had been leveled for the storage building and topping the road with topsoil taken from the property. The road extended through the wetland to approximately 100 feet from the lake shore, at which point the land became too wet to continue construction in that manner. In October 1998 Vogel installed two culverts beneath the road. In spring 1999 defendant installed a wooden boardwalk extending the road an

additional 100 feet to the lake using logs, wooden planks and Spancrete blocks.

On November 20, 2000 plaintiff issued an administrative compliance order requiring defendant to cease all discharges of fill and to submit a plan to restore the wetlands. The compliance order and a subsequent amendment were sent to defendant by certified mail and were actually received by defendant on or about December 7 and March 23, 2001, respectively. Defendant denied that any permit was required and refused to restore the property to its former state. Plaintiff commenced this action to enforce the compliance order.

MEMORANDUM

Plaintiff moves for summary judgment arguing that the undisputed facts establish that by constructing the wetland road defendant discharged a pollutant into navigable waters without a permit in violation of 33 U.S.C. 1311(a) and 1362(12). Defendant contends that he is entitled to summary judgment because he did not add fill to the wetland, forest road construction does not constitute pollution from a point source, the road was not constructed on or in waters of the United States and the construction of the road fell within an exemption or was permitted by a nationwide permit which required no application. Alternatively, defendant contends that factual disputes preclude resolution of the issues on summary judgment. Defendant also argues that plaintiff's second claim, enforcement of the administrative compliance order, is procedurally improper because he was not properly served with the compliance order which plaintiff seeks to enforce. Finally, defendant seeks summary judgment on the basis that plaintiff's actions are unconstitutional.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

CWA Violation

CWA makes the "discharge of any pollutant" unlawful unless the discharge is authorized by a statutory exemption or a permit. 33 U.S.C. 1311(a). The "discharge of any pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Accordingly, in order to prevail on its claim plaintiff must demonstrate that defendant (1) discharged a pollutant (2) from a point source (3) into navigable waters. Were all three elements established it must be determined whether the discharge was authorized by permit or exemption. Each of the three elements and the existence of a permit or exemption are the subject of dispute in these cross motions.

Discharge of a Pollutant

The term "pollutant" includes "dredged spoil,... biological materials, . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). it is undisputed that defendant, either by redepositing material from the surrounding wetland or depositing material from dry land, placed dirt, sand, logs and leaves into the wetland to build the road and boardwalk, all of which satisfy the definition of pollutant.

Plaintiff's discussion concerning whether the materials constitute "fill" within the meaning of federal regulations is irrelevant to the issue of whether there has been a discharge of a pollutant. Status of a pollutant as "fill" does not affect whether a pollutant has been discharged but is relevant in the application of 33 U.S.C. § 1344 and the regulations enacted pursuant to it (see, e.g., 33 CFR § 323; 40 CFR § 232) which address permits (and exemptions) for dredged or fill material. This issue is addressed separately in the context of defendant's forest road exemption defense.

From a Point Source

"Point source means any discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). Backhoes and bulldozers used to deposit materials in wetlands are point sources. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001); *see also United States v. Huebner* 752 F.2d 1235, 1242-43 (7th Cir. 1985). The machines used by defendant and Vogel to place materials into the wetland on the road bed were point sources within the meaning of the CWA.

Defendant argues that the road was for forestry activities that such activities are generally regulated as non-point source activities and, therefore, his road construction activities were a non-point source activity. Accepting for purposes of this element that defendant's activities were for silviculture the argument fails. It is neither logically sound nor supported by the regulations he cites. It is true that the primary pollutant discharge from forestry activities is non-point source runoff caused by the clearing of vegetation, construction of roads, and other activities which affect surface drainage. *See* 40 CFR 122.27. However, this certainly does not contradict the fact that forest roads constructed through wetlands constitute point source discharges. The applicable regulation, 40 CFR § 122.27, explicitly states as much:

> [Silviculture Point Source] does not include non-point source silvicultural activities such as . . . road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossings for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit.

A forestry purpose does not convert an obvious point source discharge of fill material into a wetland into a non-point source discharge.

Into Navigable Waters

"Navigable waters" means waters of the United States. 33 U.S.C. § 1362. The term "waters of the United States" is defined at 33 CFR § 328.3(a) to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce....

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intra-state lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(I) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Little Star Lake is an intra-state lake used by interstate travelers for recreational purposes, § 328.3 (a) (3), and a tributary of the Wisconsin river (a water used in interstate commerce) and the Mississippi river (an interstate water), § 328.3(a)(5).

Defendant's only argument in opposition to this element is that his wetlands are not "adjacent" to Little Star Lake within the meaning of § 328.3(a)(7) because there are lily pads in the lake at the point where the cedar swamp meets the lake. His argument fails as a matter of fact, statutory interpretation and common sense. "Adjacent" means "bordering, contiguous or neighboring." Under any

reasonable interpretation defendant's cedar swamp, which ends at the open water of Little Star Lake, is adjacent to the lake. The parenthetical reference in § 328.3(a)(7) which excludes from coverage wetlands adjacent to "waters that are themselves wetlands" is a reference to wetlands which are themselves waters of the United States without regard to adjacency, that is wetlands identified in § 328.3(a)(1)-(6) which qualify for waters status independent of their relationship to lakes, rivers and streams. A wetland such as defendant's which adjoins a lake which affects interstate commerce and is a tributary to navigable and interstate waters is not affected by the exception.

Were defendant's non-sensical interpretation accepted virtually all adjacent wetlands would be excluded from coverage beyond the first foot because the balance would be adjacent to other wetlands. As the Supreme Court recognized in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985) the basis for jurisdiction over wetlands adjacent to open waters is their function as "integral parts of the aquatic environment." To arbitrarily exclude wetlands from coverage because there are lily pads at the lake shoreline would be to ignore the fundamental basis for their inclusion. Not surprisingly, the only court to have expressly considered defendant's argument characterized it as absurd. *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc., LLC.*, 2003 W.L. 21995171, *16 at n. 5.

Permit or Exemption

All elements of a CWA violation having been established, defendant is liable unless his actions in building the road through the wetland was exempted from coverage or was performed pursuant to a permit. Defendant argues that his actions were exempt from coverage by the forest road exemption, 33 U.S.C. 1344 (f) (1) (E) and, alternatively, that

his actions were permitted pursuant to Nationwide Permit 26 (NWP 26).

Forest Road Exemption.

The discharge of fill material is not prohibited under the CWA if it is

> for the purpose of construction or maintenance of farm roads or forest roads ... where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

33 U.S.C. § 1344 (f) (1) (E) . Defendant maintains that his road satisfies all requirements for the exemption.

Plaintiff contends that the exemption, does not apply because the defendant's road is not a "forest road" within the meaning of the Act and because, were it a forest road, its construction was not in accordance with best management practices as required by the Act. The evidence is overwhelming that the construction of the road was not for forestry purposes and that its construction was not in accordance with best management practices. Accordingly, there is no genuine issue of fact and plaintiff is entitled to summary judgment in its favor.

The only reasonable conclusion from a review of the undisputed evidence is that the road through defendant's wetland was constructed primarily for the purpose of

transporting his seaplane to and from Little Star Lake and not for the purpose of forestry. Prior to construction of the road defendant contacted several government agencies making it clear that he intended to build an access road for his seaplane through the wetland. Only after he was advised that the activity was not permitted did he advance a forestry purpose. He constructed a boardwalk extending the road to the lake which serves no forestry purpose but, instead serves the obvious purpose of seaplane access. He uses the road to transport his plane and operate his scenic rides business. Virtually all the logging performed on the property preceded the road and was for the purpose of clearing the land to build the road and provide sufficient width for the plane wings. Logging companies deemed the property not worth commercial harvesting because of its size and hydrology. At most defendant has established that he has made some incidental use of the logs he removed to build and maintain the road. A reasonable fact finder could only conclude that the primary purpose of the road is lake access for the plane and that the purported forestry purpose was a pretext to attempt to establish an exemption from CWA requirements.

Had defendant raised a fact issue on the forestry purpose of the road the exemption would not apply because the road would not constitute best management practices as required by the Act. Under prescribed best management practices such roads are held to the minimum feasible number width and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climactic conditions." 33 CFR 323.4(a)(6)(i). Furthermore, all roads are required to be located sufficiently far from water bodies to minimize discharges, § 323.4(a)(6)(ii), vegetative disturbance is to be kept to a minimum, 323.4(a)(6)(vi) and construction of roads in wetlands is to be avoided entirely if practical alternatives exist, § 323.4(a)(6)(x).

Defendant's very limited "silvicultural operations" would probably not require a road. They certainly would not require one the length and width of that constructed, would not require extension to the lake edge and would not require a fifty foot wide clear cut to the lake. All these features are contrary to best management practices because they impose far greater impact on the wetland than would be required for the type of timber harvesting defendant suggests he might perform. All these features are unnecessary to any "silvicultural operation" but exist only to facilitate use of the road as a seaplane taxiway. The forest road exemption does not apply.

Nationwide Permit 26

Pursuant to 33 U.S.C. 1344(e) plaintiff may issue discharge permits on a general rather than individual basis for certain activities determined to have minimal environmental impact. Once such a general permit is in place activities which qualify with its terms and conditions may proceed without individual authorization. 33 CFR 330.2(c). At the time of defendant's activities a nationwide general permit, NWP 26, was in effect, 61 Fed. Reg. 65874, 65916-17 (Dec. 13, 1996). NWP 26 covered

> Discharges of dredged or fill material into headwaters and isolated waters provided that the activity meets all of the following criteria:
>
> a. The discharge does not cause the loss of more than 3 acres of waters of the United States nor cause the loss of waters of the United States for a distance greater than 500 linear feet of the stream bed;

> b. For discharges causing the loss of greater than 1/3 acre of waters of the United States, the permittee notifies the District Engineer in accordance with the "Notification" general condition;
> c. For discharges causing a loss of 1/3 acre or less of waters of the United States. the permittee must submit a report within 30 days of completion of the work, containing the information listed below;
> d. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands.

Regardless of the applicability of NWP 26, an applicant was required to comply with applicable state water quality certification requirements before a permit could be obtained. 33 U.S.C. § 1341(a)(1).

Plaintiff concedes that defendant's project met the criteria for NWP 26 except for requirement c, defendant having failed to submit the requisite report within thirty days after completion of the work. Plaintiff does not contend that the failure to file the report would have voided the permit. However, plaintiff argues that defendant failed to obtain (and in any event would have been denied) a section 401 water quality certification which is a. prerequisite to a permit under NWP 26. Defendant argues that Wisconsin either waived its right to issue section 401 permits generally or its right to deny defendant's specific request for certification by failing to act on it. 33 U.S.C. § 1341(a) (1). There is no factual support for either of defendant's arguments.

Wisconsin has not waived its right to require water quality certifications. Wisconsin timely submitted its water quality certification conditions to plaintiff on February 11, 1997 pursuant to 33 CFR § 330.4(c) (1) as demonstrated by defendant's exhibits 16 and 18. As a result of the denial of those conditions, noted in defendant's exhibit 16 and provided by 33 CFR § 330.4(c) (3), all subsequent NWP 26 applications including those of defendant were denied without prejudice until Wisconsin issued an individual 401 certification or waived its right to do so.

Defendant concedes that Wisconsin did not issue him an individual 401 certification for his road. In fact, it is undisputed that its agents advised him that they would probably deny any such request. Rather, he asserts that he filed a request for certification to which he received no response within 60 days giving rise to a presumption of waiver of the certification requirement for his project in accordance with § 330.4(c)(6). In support of this argument defendant contends that an "Application for Water Regulatory Permits" filed with the Corps on January 16, 1997, a copy of which was provided to WDNR, constituted an application for state section 401 certification. That document identified the proposed activity as "construction of a permanent logging road in accordance w/33 CFR 323 .4 (a) (6)" and identified the purpose, need and intended use of the project as "logging and other forestry related activities."

Given the stated purpose of the project to construct a forestry road which was exempt from the requirement of a permit, WDNR did not consider it a request for state certification and did not process it as a request for certification. On February 6, 1997, plaintiff send a letter to defendant advising him that his project would not qualify for exemption and instructed him to amend his application to seek a permit. On February 10, 1997 representatives of

plaintiff and WDNR met with defendant at his property and advised him to apply for a permit. Clearly at that time neither defendant, plaintiff nor WDNR believed that the January 16, 1997 document was a request for the issuance of a permit or for state certification for the issuance of a permit. Defendant's unequivocal position was that he did not require a permit. No subsequent application was filed. Accordingly, Wisconsin did not waive its right to deny certification.

Additional Defenses

Defendant raises three additional defenses to plaintiff's claims: First, that the doctrine of res judicata bars claims relative to the placement of the boardwalk and boat ramp; second, that the administrative compliance order which. is the basis for the second claim of the complaint was not properly served; third, that the regulation of plaintiff's activities on his property is unconstitutional.

Res Judicata

On August 1, 2000 a WDNR agent issued defendant citations for placing a seaplane ramp and concrete blocks onto the bed of Little Star Lake in violation of Wis. Stat § 30.12 which prohibits the placement of material or structures on the bed of a navigable water. Defendant was ultimately found guilty of the violation involving the concrete blocks and not guilty of the alleged violation involving the ramp. Defendant has removed the blocks. Defendant now argues that the WDNR prosecution of these state law violations precludes the present CWA enforcement action. Since neither the claims nor the parties were the same in the two actions, the defense is inapplicable.

Res Judicata (claim preclusion) precludes parties from raising claims which were previously adjudicated, or which

could have been raised in a prior action between them, *Allen v. McCurry*, 449 U.S. 90, 94 (1980). An action for violation of a Wisconsin statute barring placement of structures on Wisconsin lake beds is plainly distinct from an action for improper discharge of pollutants in violation of the CWA. Furthermore, it is undisputed that the State of Wisconsin had no authority to bring a CWA action in state court. Accordingly, the. CWA claim presently before the Court was not and' could not have been litigated in the state action.

Collateral estoppel (issue preclusion) precludes relitigation of an issue of fact or law necessary to a judgment in a prior action involving the same party. *Id.* Assuming that some common factual issues might exist between the state prosecution and the present CWA action (though this has not been established) it is clear that the United States and the State of Wisconsin are not the same party for purposes of collateral estoppel. The doctrine could only apply against the United States in this action if it exercised control over and carried the "laboring oar" in the previous action. *Montana v. United States*, 440 U.S. 147, 155 (1979). There is no evidence that the United States had any significant involvement in the state proceeding. Accordingly, there is no legal or factual basis for a res judicata defense.

Unconstitutionality

Defendant contends that defendant's attempted regulation of his wetlands exceeds congressional Commerce Clause authority because the connection between his wetland and interstate commerce is too tenuous and remote. Specifically, that it is unconstitutional to regulate headwaters distant from rivers used in commercial navigation because such bodies of water have an insufficient impact on interstate commerce. The Supreme Court expressly addressed and rejected challenges to Corps authority to regulate wetlands adjacent to

all waters of the United States for purpose of protecting the aquatic ecosystem as a whole. *Riverside Bayview Homes*, 474 U.S. at 133-34. In so doing the Court affirmed not only congressional power under the Commerce Clause to regulate defendant's wetland but also the reasonableness of the Corps interpretation of the CWA in imposing such regulations. Defendant's argument that the regulation is unconstitutional must be rejected.

Improper Service

Finally, defendant suggests that the second claim of the complaint should be dismissed because he was not personally served with the compliance order plaintiff now seeks to enforce in accordance with 33 U.S.C. § 1319(a) (5)(A). Under the circumstances presented here, a failure of personal service is not fatal to plaintiff's claim. It is undisputed that defendant actually received the administrative compliance order and an amendment to it. It is also undisputed that he responded to the order without raising an objection to the mode of service. Pursuant to 33 U.S.C. 1319(a)(4) the order could not take effect until defendant had an opportunity to consult with plaintiff. As a result of these circumstances there is no possibility of prejudice to defendant from the absence of personal service.

Had defendant objected to the form of service at the time it could have been easily and inexpensively corrected. Having chosen not to do so and fully litigating the matter on its merits under circumstances where there is no evidence of bad faith on the part of plaintiff or prejudice to defendant, he has waived strict compliance with the personal service requirement. *United States v. Myslajek*, 568 F.2d 55, 57 (8th Cir. 1977).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that the parties submit proposed findings of fact and conclusions of law concerning that relief to be awarded by October 1, 2003.

Entered this 18th day of September, 2003.

BY THE COURT

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Appendix D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 18, 2006

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-3199

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Western District of Wisconsin
v.	No. 03 C 75
PAUL A. HEINRICH, *Defendant-Appellant.*	John C. Shabaz, *Judge.*

ORDER

On September 21, 2006, the defendant-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have

requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

FILED
MAY 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1271

In the Supreme Court of the United States

PAUL A. HEINRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case, which are adjacent to a permanent lake that flows through perennial streams to traditional navigable waters, are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(7), 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA); 33 U.S.C. 1362(7).

2. Whether the district court had subject-matter jurisdiction over this civil enforcement action brought by the United States under the CWA.

3. Whether the application of the CWA to the wetlands at issue in this case is a permissible exercise of congressional power under the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution.

4. Whether petitioner received adequate notice of his obligation to obtain a state water quality certification in order to qualify for coverage under Nationwide Permit 26.

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In the Supreme Court of the United States

No. 06-1271

PAUL A. HEINRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 184 Fed. Appx. 542. The opinion of the district court (Pet. App. 25a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2006. A petition for rehearing was denied on December 18, 2006 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on March 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution

Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The government alleged that petitioner had discharged fill material into "the waters of the United States," see 33 U.S.C. 1362(7), without a permit, in violation of 33 U.S.C. 1311(a) and 1344. The district court granted the government's motion for summary judgment on liability, holding that petitioner's unpermitted discharges violated the CWA. Pet. App. 25a-42a. After a trial to determine the appropriate sanction, the district court ordered petitioner to restore the wetlands and to pay a civil penalty of $75,000. *Id.* at 7a-9a. The court of appeals affirmed. *Id.* at 1a-6a.

1. a. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States."

See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

b. The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis for activities that meet specified criteria. 33 U.S.C. 1344(e). The Act provides that any applicant for a CWA permit must obtain and provide to the Corps a certification from the relevant State that the proposed discharge will comply with state water quality standards. 33 U.S.C. 1341(a)(1). If a State fails to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of the request, the applicant's obligation to provide the Corps with such certification is waived. *Ibid.*

Activities authorized by a nationwide permit (NWP) may generally proceed without further Corps approval once all terms and conditions for the permit have been met. 33 C.F.R. 330.2(c) and (h); see 33 C.F.R. 330.1(b). A discharge covered by an NWP is lawful, however, only

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3(a), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

if the person who undertakes the discharge has obtained a state water quality certification or waiver. 33 C.F.R. 330.4(b)(2) and (c)(2). For an NWP, a State may issue a general water quality certification with special conditions. The Corps in turn may incorporate the State's conditions as regional conditions of the NWP. 33 C.F.R. 330.4(c)(2). If the Corps finds the State's conditions to be inconsistent with 33 C.F.R. 325.4, however, the State's "conditioned * * * water quality certification will be considered a denial of the certification" for the NWP. 33 C.F.R. 330.4(c)(2). In that event, a person who seeks to discharge pollutants into "waters of the United States" must obtain an individual water quality certification from the State pursuant to Section 401 of the CWA, 33 U.S.C. 1341, in order to rely on the NWP. 33 C.F.R. 330.4(c)(3).

At the times relevant to this enforcement action, Corps regulations established a nationwide permit known as NWP 26. That NWP, which was subject to the state water quality certification requirement, authorized discharges of dredged or fill material into headwaters of other waters of the United States provided that the discharge caused a loss to waters of the United States of three acres or less. See 61 Fed. Reg. 65,916-65,917, 65,920 (1996).

c. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.*

v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to actual or proposed pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such

water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

2. Petitioner is an attorney and licensed pilot who owns a 9.5-acre tract containing eight acres of white cedar swamp adjacent to Little Star Lake in northern Wisconsin. Pet. App. 2a, 5a, 26a. Petitioner owned and operated a seaplane tour business, using the property to store his seaplane and using the lake to take off and land the plane. *Id.* at 26a. Little Star Lake is also used for recreational fishing, boating, and snowmobiling, including by visitors to a year-round resort that operates on the lake. *Ibid.*

In 1996, petitioner sought to construct a road that would serve as a seaplane taxiway leading from the lake through the swamp to a hangar on the site. Pet. App.

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

26a. When the Wisconsin Department of Natural Resources (WDNR) and the Corps learned of petitioner's plans, the agencies informed him that he was unlikely to obtain the necessary state water quality certification and Corps permit for a seaplane access road. *Ibid.* When petitioner told those agencies that he instead planned to construct a "logging road" exempt from the permitting requirements of the CWA, see 33 U.S.C. 1344(f)(1)(E), the Corps and WDNR advised him on several occasions that the project would not be exempt. Pet. App. 27a.

Petitioner nevertheless proceeded with the road-building project without obtaining the requisite permits. Pet. App. 27a-28a. When the Corps learned of the road's existence, it referred the matter to EPA. Decl. of Michael F. O'Keefe, para. 36 (Dkt. No. 32); see Pet. App. 2a. EPA subsequently "issued an administrative compliance order requiring [petitioner] to cease all discharges of fill and to submit a plan to restore the wetlands," but petitioner "denied that any permit was required and refused to restore the property to its former state." *Id.* at 28a.

3. The United States subsequently filed suit in federal district court, alleging that petitioner had violated the CWA by filling wetlands on his property without a permit. Pet. App. 2a, 28a. The district court granted the government's motion for summary judgment with respect to liability. *Id.* at 25a-42a. The court found that petitioner had discharged a pollutant into "waters of the United States" covered by the CWA. *Id.* at 30a-33a. The district court further held that those discharges were unlawful because (1) in light of the purpose of the road and the manner of its construction, petitioner's road did not qualify for the CWA's forest road exemp-

tion from the permit requirement, *id.* at 34a-36a; and (2) petitioner's pollutant discharges were not authorized by NWP 26 because petitioner had failed to obtain a state water quality certification, *id.* at 36a-39a. The district court subsequently imposed a $75,000 civil penalty and ordered petitioner to fully restore the wetlands. *Id.* at 2a, 7a-22a.

4. The court of appeals affirmed. Pet. App. 1a-6a.

a. Petitioner contended that the pollutant discharges associated with his road-building activities were covered by NWP 26 because the State of Wisconsin had "waived its right to require water quality certification for NWP 26 projects." Pet. App. 3a. The court of appeals rejected that contention. *Id.* at 3a-4a. The court explained that, "[i]f a state denies blanket water quality certification for a particular NWP, or if the Corps deems the conditions imposed by a state to be the equivalent of a denial, then individuals seeking to proceed under a NWP must obtain individual water quality certifications." *Id.* at 3a. After examining the course of dealings between federal and state officials, the court found that Wisconsin had not waived its right to issue a state water quality certification for NWP 26, and that the Corps had treated the conditions imposed by the State as a denial of NWP certification. *Id.* at 3a-4a. For that reason, the court concluded, "each applicant seeking to use NWP 26 in" Wisconsin was required "to obtain an individual state water quality certification." *Id.* at 4a.

b. Petitioner further contended that the requirement of an individual water quality certification could not properly be applied to him because the Corps had failed to provide adequate public notice that it construed the conditions imposed by the State as a denial of blanket certification for NWP 26. Pet. App. 4a. The court of

appeals rejected that argument. *Id.* at 4a-5a. The court explained that

> the regulations *are* clear that an individual water quality certification is required where a state has denied blanket certification under a particular NWP. 33 C.F.R. § 330.4(c)(6). Nowhere do the regulations indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise. Yet [petitioner] * * * seems to assume that he had a legal right to go forward with his access road simply because no one ever told him he couldn't.

Id. at 5a. The court concluded that petitioner "should have read the appropriate regulations more carefully and inquired about the status of state water quality certification requirements before he cavalierly moved forward with his project." *Ibid.*

c. Thirteen days after the court of appeals' ruling, this Court issued its decision in *Rapanos*. Petitioner sought rehearing or rehearing en banc, arguing that the case should be remanded to the district court to determine whether, under *Rapanos*, the wetlands into which he discharged fill were "waters of the United States" within the meaning of the CWA. The court of appeals denied the petition. Pet. App. 43a-44a; see Pet. 8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 17-24) that the wetlands at issue in this case are not "waters of the United States" within the meaning of the CWA. That argument

was not preserved in the court below, and it lacks merit in any event.

a. Petitioner did not argue before the court of appeals panel that his wetlands were outside the coverage of the CWA, see Pet. 18 n.8, and the court did not address the question. Although petitioner raised his current challenge in a petition for panel rehearing with suggestion for rehearing en banc, that filing was insufficient to preserve the claim under established Seventh Circuit practice. See, *e.g.*, *Indiana Gas Co.* v. *Home Ins. Co.*, 141 F.3d 314, 321 (7th Cir.) (opinion denying reh'g) ("An argument made for the first time in a petition for rehearing has been forfeited."), cert. denied, 525 U.S. 931 (1998). This Court typically declines to address issues that were neither timely presented to nor decided by the court below. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

b. Petitioner argues (Pet. 21-22) that his failure to raise this issue in the Seventh Circuit may be excused because the challenge goes to the subject-matter jurisdiction of the district court and therefore may be advanced at any stage of the litigation. Even if petitioner were correct in characterizing the question of CWA coverage as one of subject-matter jurisdiction, the absence of any analysis of the issue by the court of appeals would weigh substantially against a grant of certiorari. In any event, the question whether petitioner's wetlands were encompassed by the CWA term "waters of the United States" goes to the merits of the government's enforce-

ment action, not to the district court's jurisdiction to decide the case.

Under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (jurisdiction over suits brought by United States as plaintiff), the district court had ample statutory authority to adjudicate the government's suit. In order to obtain either monetary or injunctive relief, the government was required to prove that petitioner's wetlands fell within "the waters of the United States" as that phrase has been construed in this Court's precedents. But if the government had failed to carry its burden on that point, the proper disposition of the suit would have been a ruling for petitioner on the merits rather than a dismissal for lack of jurisdiction. See *United States* v. *Krilich*, 209 F.3d 968, 972 (7th Cir.) (explaining, in comparable circumstances, that the relevant "interstate connection, *i.e.*, that the waters involved were 'waters of the United States,' is merely an element of the United States' Clean Water Act case under section 301; subject matter jurisdiction over this question comes from 28 U.S.C. § 1331"), cert. denied, 531 U.S. 992 (2000); cf. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 503 (2006) (distinguishing between the district court's "'subject-matter' jurisdiction over a controversy" and "the essential ingredients of a federal claim for relief").[3]

[3] Petitioners' reliance (Pet. 22) on *United States* v. *Hartsell*, 127 F.3d 343 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998), is misplaced. The defendants/appellants in *Hartsell* were convicted of criminal CWA violations based on their discharges of pollutants into a public sewer system. See 127 F.3d at 347-348. They argued, inter alia, that "the district court lacked subject matter jurisdiction in the instant case" because their discharges were not properly subject to federal regulation. *Id.* at 348. The court of appeals rejected that argument, holding that "the CWA clearly provides for regulation of discharges into public sewer systems," and that "Congress has the constitutional authority to"

c. Even if petitioners' contention that the CWA does not cover his wetlands had been properly preserved in the court of appeals, the issue would not warrant this Court's review. Based on the undisputed record evidence in this case, petitioner's wetlands would be treated as part of the "waters of the United States" under the interpretive approaches taken by at least eight Members of this Court in *Rapanos*. That evidence establishes that petitioner's wetlands have a continuous surface connection with Little Star Lake, which is connected by a series of perennial streams and lakes to the Wisconsin River, a traditional navigable water that flows into the Mississippi River. See Decl. of Byron "Dale" Simon, paras. 31-38 (Dkt. No. 34). Consistent with that evidence, the district court explained that the wetlands "slope[] toward and [are] hydrologically connected to Little Star Lake. Little Star Lake * * * is connected by surface water and drains into Star Lake and ultimately into the Wisconsin and Mississippi Rivers." Pet. App. 26a.[4]

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regulate such discharges. *Ibid.* The court concluded that the defendants "are unable to persuade us that either Congress, in passing the CWA, or the district court, in hearing the criminal case against the appellants, acted beyond its powers." *Id.* at 349. Although the court of appeals did not specifically reject the defendants' contention that their challenge went to the subject-matter jurisdiction of the district court, neither did it endorse that characterization, and the court's disposition of the case did not turn on whether the disputed issue was one of subject-matter jurisdiction.

[4] Relying on 33 U.S.C. 59aa, petitioner contends (Pet. 10 & n. 3) that the Wisconsin River is not a "navigable" waterway for purposes of the CWA. Petitioner's reliance on Section 59aa is misplaced. Section 59aa states that a portion of the Wisconsin River "is hereby declared to be a nonnavigable waterway of the United States for purposes of title 46, * * * and the other maritime laws of the United States." Section 59aa

The four-Justice plurality in *Rapanos* concluded that the CWA term "waters of the United States" encompasses wetlands having a "continuous surface connection," 126 S. Ct. at 2227, to "relatively permanent, standing or continuously flowing bodies of water," *id.* at 2225, that are connected to traditional navigable waters, *id.* at 2226-2227. Under that approach, the wetlands at issue in this case are part of the "waters of the United States." The four Justices who dissented in *Rapanos* stated that they would sustain the exercise of federal regulatory jurisdiction under the CWA in *all* cases in which either the plurality's or Justice Kennedy's standard for CWA coverage is satisfied. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting). Petitioner's wetlands thus would be treated as part of the "waters of the United States" under the interpretive approaches adopted by at least eight Members of this Court.[5]

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does not address the river's status under the CWA. In any event, the Wisconsin River is a tributary of the Mississippi River, which petitioner does not dispute is a traditional navigable water.

[5] Under *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks* v. *United States*, 430 U.S. 188 (1977), as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, No. 05-11284 (Apr. 25, 2007), slip op. 18 n.15, 23 (analyzing concurring and dissenting opinions in a prior case to

d. Petitioner contends (Pet. 18-19) that the circuits are divided with respect to the standard to be used in identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Because the record in this case makes clear that petitioner's wetlands are covered by the CWA under the *Rapanos* plurality's standard, the only issue that could potentially affect the outcome of this case is whether the CWA term "waters of the United States" encompasses wetlands that satisfy the plurality's standard but do not satisfy Justice Kennedy's "significant nexus" standard. Even if that question otherwise warranted this Court's review, the instant case would be an unsuitable vehicle to decide it, since petitioner did not properly preserve his challenge to CWA coverage in the court of appeals and that court did not address the issue. In any event, no square circuit conflict exists.

In *United States* v. *Johnson*, 467 F.3d 56, 60-66 (1st Cir. 2006), the court of appeals agreed with the government (see note 5, *supra*) that the CWA term "waters of the United States" encompasses all wetlands that satisfy

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identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

Here, both of the courts below issued their decisions before this Court's ruling in *Rapanos*, and petitioner did not argue in the court of appeals that his wetlands fell outside the CWA's coverage. For those reasons, neither the court of appeals nor the district court had occasion to discuss the application of Justice Kennedy's "significant nexus" standard. Because the record makes clear that the wetlands would be treated as part of "the waters of the United States" under the standards endorsed by at least eight Members of this Court in *Rapanos*, petitioner's discharges were covered by the CWA regardless of whether the "significant nexus" standard would also be satisfied.

either the plurality's standard or that of Justice Kennedy. The court observed that, if the term were read to exclude wetlands that satisfy the plurality's standard but not Justice Kennedy's, "there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." *Id.* at 64.

In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), petition for cert. pending, No. 06-1331 (filed April 2, 2007), the court remanded the case for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case.

In *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006), the court stated that Justice Kennedy's concurring opinion in *Rapanos* "provides the controlling rule of law." As in *Gerke*, however, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue were covered by the CWA. See *id.* at 1030-1031. Moreover, a petition for rehearing with respect to the proper application of *Rapanos* is currently

pending before the court of appeals in that case, so it is possible that the Ninth Circuit will revise its analysis. Because no court of appeals has rejected a claim of CWA coverage in a case involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's, questions concerning the proper disposition of such a case do not currently warrant this Court's review.

e. Petitioner contends (Pet. 23-24) that the application of the CWA to his wetlands would exceed Congress's power under the Commerce Clause. That claim lacks merit. In articulating a definition of the term "waters of the United States" that was narrower than the definition reflected in the Corps and EPA regulations, the *Rapanos* plurality expressed reluctance "to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 126 S. Ct. at 2224. Because the *Rapanos* plurality invoked principles of constitutional avoidance as a factor supporting its construction of the disputed statutory language, the clear import of its opinion is that protection of wetlands encompassed by the plurality's standard falls comfortably within Congress's commerce power. The four dissenting justices expressed the view that even the Corps' broader approach to CWA coverage raised no substantial constitutional concern. See *id.* at 2261-2262 (Stevens, J., dissenting). Thus, at least eight Justices in *Rapanos* agreed that the CWA is constitutional as applied to wetlands that satisfy the plurality's standard for coverage under the Act.[6]

2. Petitioner contends (Pet. 25-28) that the application of the CWA to his wetlands violated his rights under

[6] Justice Kennedy likewise expressed the view that his own interpretation of the CWA "does not raise federalism or Commerce Clause concerns." 126 S. Ct. at 2249 (Kennedy, J., concurring).

the Due Process Clause because he did not receive adequate notice that he was required to obtain an individual water quality certification from Wisconsin before proceeding with his road-building project. That claim was not properly preserved below and in any event lacks merit.

a. Although petitioner argued in the courts below that he had received inadequate notice of the need for an individual state water quality certification, he did not identify the Due Process Clause as the basis for his claim until the petition for a writ of certiorari. See Pet. 25 n.9. The court of appeals explained (see Pet. App. 4a-5a) why petitioner had received all the notice to which he was entitled under the applicable regulations, but it had no occasion to decide whether additional notice was required by the Fifth Amendment. The absence of any analysis of the relevant constitutional precedents by the courts below would hinder any effort by this Court to decide petitioner's current Due Process Clause claim. Petitioner's prior failure to frame his challenge in constitutional terms is an independently sufficient reason for this Court to deny review.

b. Section 401(a)(1) of the CWA unambiguously requires applicants for discharge permits under the Act to provide a state water quality certification to the permitting agency. 33 U.S.C. 1341(a)(1). Agency officials had repeatedly told petitioner that the discharge of fill into the wetland without a state water quality certification would be unlawful. Pet. App. 27a. Even when a particular discharge is covered by an NWP, the Corps' regulations provide clear notice "that an individual water quality certification is required where a state has denied blanket certification under a particular NWP." *Id.* at 5a (citing 33 C.F.R. 330.4(c)(6)).

Petitioner also contends (Pet. 26-27) that the Corps was required to provide public notice that it had construed the conditions imposed by Wisconsin as a denial of blanket certification for NWP 26. As the court of appeals explained, however, the applicable regulations do not "indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise." Pet. App. 5a. If petitioner intended to rely on NWP 26, he could and should have contacted agency personnel to ascertain the status of the State's water quality certification. *Ibid.*; cf. 33 C.F.R. 330.4(a) ("It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required."). Petitioner had ample notice of the need to investigate and comply with water quality certification requirements, and ample access to agency officials who could assist him in that endeavor. Petitioner cites no authority suggesting that the Due Process Clause required the Corps to announce in some more public way that it viewed the State's conditions as a denial of blanket certification for NWP 26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-1271

In the

Supreme Court of the United States

PAUL A. HEINRICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in light of this Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), the United States Army Corps of Engineers (the Corps) was legally authorized to regulate a private property owner's development of a road through private wetlands which, by virtue of their location above local headwaters and the high water mark of a neighboring lake, have no significant nexus with navigable-in-fact waters.

2. Whether, in light of this Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), the federal courts lacked subject matter jurisdiction to enforce the Corps' attempt to prohibit a private property owner from developing a road through private wetlands which have no significant nexus with navigable-in-fact waters, and to sanction him for doing so.

3. Whether the extension of jurisdiction under the Clean Water Act to private wetlands adjacent to a water, deemed by Congress to be "non-navigable for purposes of shipping and other maritime laws," exceeds the power of Congress under the Commerce Clause, Article I, Section 8.

4. Whether, when the Corps is legally required to notify the public of a regulatory obligation to obtain individual state water quality certification before private wetlands can be altered, but fails to do so, the imposition of sanctions and penalties against a private developer who alters private wetlands without notice of the certification obligation is prohibited by the Due Process Clause of the Fifth Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Paul A. Heinrich. Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF attorneys have litigated numerous cases addressing a balanced approach to environmental regulation and the scope of the Clean Water Act in this Court, including *Rapanos v. United States*.

PLF's analysis of *Rapanos* and the relevant wetlands regulations will provide a valuable and necessary viewpoint to assist the Court in resolving this case.

INTRODUCTION

Nearly twelve months ago in *Rapanos v. United States*, this Court invalidated the federal Clean Water Act regulations the government seeks to enforce in this case. Although this Court unanimously acknowledged the need for new regulations defining federal jurisdiction over wetlands, in the past year the Corps of Engineers and the Environmental Protection Agency have failed to even propose, let alone adopt, regulations implementing the *Rapanos* decision. In fact, these agencies

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party authored any part of this brief and no person or entity made a monetary contribution for the preparation or submission of this brief.

have yet to provide internal interpretive guidelines to the district offices to ensure consistent and valid jurisdictional determinations. To the contrary, these agencies continue to enforce their illegal regulations as if this Court had never spoken. This is a breach of the public trust which must be remedied. When ordinary citizens are subject to civil and criminal penalties for the ordinary use of their property, they deserve to know what the law is. Therefore, this Court should grant the writ of certiorari and fulfill its primary purpose—to determine what the law is.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE REGULATORY DEFINITION OF "WATERS OF THE UNITED STATES" ON WHICH THE GOVERNMENT RELIED WAS INVALIDATED BY THIS COURT'S *RAPANOS* DECISION

A five-justice majority in *Rapanos* held that something more than a mere "hydrological connection" between a wetland and a traditional (or navigable-in-fact) waterway is required to establish federal jurisdiction under the Clean Water Act. But, no single rationale garnered a majority vote. Four Justices, forming a plurality on the Court, determined the Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" generally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional waters. *Rapanos*, 126 S. Ct. 2208, 2225 (2006) (Scalia, J.). These Justices would also authorize federal regulation of wetlands abutting these water bodies, but only if they contain a continuous surface water connection such that the wetland and the covered water are "indistinguishable." *Id.* at 2234. Ephemeral and insubstantial connections would not suffice. *Id.* at 2225. Justice Kennedy concurred in the

judgment but proposed a broad and undefined "significant nexus" test for determining federal Clean Water Act jurisdiction. *Id.* at 2236 (Kennedy, J., concurring in the result). Under this test, any wetland would be subject to federal regulation if it is deemed to "significantly affect" a traditional navigable waterway. *Id.* at 2248.

As Petitioner notes, there is now a direct conflict between the Seventh Circuit decision in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), and the First Circuit decision in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), as to which of these two jurisdictional tests is controlling in *Rapanos*. The Seventh Circuit in *Gerke* held that federal wetland jurisdiction under the Clean Water Act may only be established based on Justice Kennedy's "significant nexus" test, whereas the First Circuit in *Johnson* held that federal wetland jurisdiction could be established under either the plurality approach or the Kennedy approach. A petition to resolve this conflict is now pending before this Court in *Gerke v. United States* (06-1331). That conflict alone warrants review of this case, along with *Gerke*. But, under either test, the federal regulations applied to Heinrich are unlawful. Therefore, the decision below cannot stand.

The relevant regulations interpret the statutory term "waters of the United States" to include, in addition to traditional interstate navigable waters, 33 C.F.R. § 328.3(a)(1) (2004), "[a]ll interstate waters including interstate wetlands," § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," § 328.3(a)(3); "[t]ributaries of [such] waters," § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," § 328.3(a)(7). The regulations define "adjacent" wetlands as those "bordering, contiguous [to],

or neighboring" waters of the United States. § 328.3(c). They specifically provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.*

In opposition to Heinrich's petition, it is likely the government will argue that this Court's decision in *Rapanos* did not strike down any part of these regulations, as it has argued in similar cases. But that argument is insupportable. Indeed, every faction on this Court—including the dissent—acknowledged that the *Rapanos* majority *did* override the existing regulations and called for the adoption of new regulations.

Justice Breyer was quite clear on the matter. In response to the *Rapanos* majority, he stated unequivocally: "In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law." *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting). That, he said, was not what Congress intended. *Id.* Therefore, he concluded, the Court's "opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so." *Id.* This, of course, would not be necessary if the *Rapanos* decision had not invalidated the existing regulatory definition of "waters of the United States."

Chief Justice Roberts, who joined the plurality decision, was equally clear. He first observed that this Court's prior decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), had already invalidated agency interpretation of Clean Water Act authority, but new rule-making "went nowhere." *Rapanos*, 126 S. Ct. at 2235-2236 (Roberts, C.J., concurring). The Chief Justice castigated the government for failing to adopt regulations that defined federal authority in accordance with the language of the statute and that took

advantage of the *Chevron* deference standard. *Id* According to Justice Roberts, "[r]ather than refining its view of its authority in light of [this Court's] decision in *SWANCC*, and providing guidance meriting deference under [this Court's] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." *Id.* at 2236.

The "essentially boundless view of the scope of its power" to which the Corps chose to adhere, and to which Chief Justice Roberts refers, is embodied in the existing regulations which the *Rapanos* decision overruled, and which the Corps continues to enforce today. Because "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer," Chief Justice Roberts believed it was all the more lamentable that the agencies did not adopt regulations, different from the existing regulations, that recognized the "clearly limiting terms Congress employed in the Clean Water Act" and codified "*some* notion of an outer bound to the reach of their authority." *Id.* at 2235-2236.

The extent to which *Rapanos* invalidated the existing regulations defining "waters of the United States" can be discerned by comparing the jurisdictional standards expressed in the decision with the regulations' contradictory text. This comparison shows that *Rapanos* invalidated the existing regulations as to jurisdictional "tributaries" and "wetlands" and the meaning of "adjacent."

A. *Rapanos* Invalidated the Regulatory Definition of Jurisdictional Tributaries

In his plurality opinion, Justice Scalia observed, as did Chief Justice Roberts, that following *SWANCC*, "the Corps did not significantly revise its theory of federal jurisdiction." *Rapanos*, 126 S. Ct. at 2217. Instead, the Corps relied on its existing regulations, which include "tributaries" as "waters of the United States," without defining the term, and continued to

employ "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries.'" *Id.* By way of example, Justice Scalia cited Corps claims of jurisdiction over remote roadside ditches, irrigation ditches and drains with intermittent flows, dry land features such as "arroyos, coulees, and washes," and occasionally flowing "drain tiles, storm drain systems, and culverts." *Id.* at 2218. And, "most implausibly of all," an arid development site "located in the middle of the desert, through which 'water courses . . . during periods of heavy rain.'" *Id.*

The plurality forcefully rejected this expansive regulatory construction of "tributaries" and concluded that "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers [, and] lakes.'" *Id.* at 2225. But that was not all; the plurality added an additional jurisdictional limitation: "The phrase ['waters of the United States'] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* The plurality concluded, therefore, that "[t]he Corps' expansive interpretation of ['the waters of the United States'] is thus not 'based on a permissible construction of the statute,'", which otherwise requires broad deference to federal regulatory interpretations. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). In other words, the regulations themselves were invalid.

Although Justice Kennedy did not define jurisdictional tributaries in his concurrence, he did conclude, as did the plurality, that the existing regulations went too far. "The Corps' existing standard for tributaries," he stated, provided no assurance that they (or adjacent wetlands) would significantly affect downstream navigable-in-fact waters. *Rapanos*, 126 S. Ct. at 2248. "Yet," he concluded, "the breadth of this standard—which seems to leave wide room for regulation of

drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play" an important role in the aquatic system. *Id.* at 2249. According to Justice Kennedy, "in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.*

Thus, under both the Scalia plurality and the Kennedy concurrence, the existing regulations—enforced against Heinrich in this case—are invalid.

B. *Rapanos* Invalidated the Regulatory Definition of Jurisdictional Wetlands

Another point of conflict between the *Rapanos* decision and the existing regulations relates to wetlands. Whereas the regulations include any wetland adjacent to any "tributary" or so-called other waters, 33 C.F.R. § 328.3(a)(5), neither the plurality nor Justice Kennedy accepted this interpretation of jurisdictional wetlands. To the contrary, both the plurality's and Justice Kennedy's definitions of jurisdictional wetlands are irreconcilable with the regulatory text.

Under the plurality opinion. "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' [i.e., continuously flowing rivers, lakes and streams] in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' " are covered by the Act. *Rapanos*, 126 S. Ct. at 2226. "Wetlands with only an intermittent, physically remote hydrological connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters" described in *SWANCC*. *Id.* at 2226. Put another way, according to the plurality, wetlands are "waters of the United States" only if they

are "as a practical matter *indistinguishable* from waters of the United States." *Id.* at 2234. In contrast, the existing regulations, by their terms, include any wetland adjacent to any tributary without regard to a continuous surface connection, or any connection whatsoever.

The definition of jurisdictional wetlands provided by Justice Kennedy is equally at odds with the regulations. Under Justice Kennedy's "significant nexus" approach, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " *Id.* at 2248. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' " *Id.* But the existing regulations have no such nexus requirement. Therefore, they cannot be reconciled with the *Rapanos* decision.

C. *Rapanos* Invalidated the Regulatory Definition of Adjacent

As noted above, the existing regulations define "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. 33 C.F.R. § 328.3(c). They specifically provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* However, both the plurality and Justice Kennedy rejected this definition of "adjacent."

Justice Scalia expressed incredulity at the breadth the Corps had given the plain term "adjacent" in the regulations. For example, he noted the Corps had concluded that wetlands are "adjacent" to covered waters under the existing regulations, and are jurisdictional, if they are hydrologically connected

"through directional sheet flow during storm events" to navigable waters; or, they lie within a 100-year floodplain that is connected to navigable waters. *Rapanos*, 126 S. Ct. at 2218. The Corps had also concluded that presence within 200 feet of a tributary automatically renders a wetland "adjacent" and jurisdictional as well as wetlands separated from flood control channels by 70-foot-wide berms. *Id.*

The plurality roundly rejected this extravagant definition of " adjacent" and offered a definition more consistent with this Court's decisions in *SWANCC* and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). As Justice Scalia observed, *SWANCC* "confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting (adjacent) wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters." *Rapanos*, 126 S. Ct. at 2226. The plurality thus equated the term "adjacent" with "abutting."

Under the plurality test for jurisdiction, two findings must be made:

> First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Id. at 2227. The regulatory definition of "adjacent" as "bordering, contiguous, or neighboring" is clearly inconsistent with the plurality opinion. As Justice Scalia took pains to point out:

> The phrase "adjacent wetlands" is not part of the statutory definition that the Corps is authorized to

> interpret, which refers only to "the waters of the United States." In expounding the term "adjacent" as used in *Riverside Bayview*, we are explaining *our own* prior use of that word to interpret the definitional phrase "the waters of the United States." However ambiguous the term may be in the abstract, as we have explained earlier, "adjacent" as used in *Riverside Bayview* is not ambiguous between "physically abutting" and merely "nearby."

Id. at 2229-2230.

The only conclusion that can be drawn from this inconsistency is that the regulatory definition is invalid and of no effect under the plurality approach. And, the same conclusion must be drawn from the Kennedy approach as well. Although Justice Kennedy was more nuanced in his assessment of the adjacency standard, Justice Kennedy expressly acknowledged the invalidity of the existing regulations.

Justice Kennedy's attack on the existing regulations started with his rejection of the Corps' assertion that the reasoning in *Riverside Bayview*, authorizing federal regulation of wetlands physically abutting navigable-in-fact waterways, could apply equally to all wetlands with a mere connection to navigable-in-fact waterways. *Id.* at 2248. Justice Kennedy remarked: "This, though, seems incorrect." *Id.* "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.*

From this, Justice Kennedy reasoned that if the Corps wished to regulate wetlands adjacent to tributaries categorically, like the physically abutting wetlands in *Riverside Bayview*, it would need to determine whether, due to volume of flow, proximity to navigable waters, or other relevant considerations, the tributaries perform important functions for an aquatic

system incorporating navigable waters. *Id.* Justice Kennedy concluded, as he must, that the Corps' existing standard for tributaries, however, provides no such assurance. *Id.* That is to say, neither the current case law nor the existing regulations were legally adequate to support federal regulation of wetlands, based on their "adjacency" to tributaries, as jurisdictional waters.

D. *Rapanos* Invalidated the Requirement for a State Water Quality Certification

In the decision below, the Seventh Circuit concluded that because of the minimal environmental impacts Heinrich's project would have on his wetlands, he could have proceeded, without prior federal approval, under Nationwide Permit 26, had he obtained a state water quality certification in accordance with the federal regulations. *See* Petition Appendix at 3a. But that requirement became void when this Court invalidated the federal regulations in *Rapanos* as shown above. Therefore, to find Heinrich liable for violating the Clean Water Act, either the enforcing agency or a reviewing court would have had to apply the jurisdictional test(s) set forth in *Rapanos*. That was never done.

At no time has the agency made a finding under *Rapanos* that the wetlands on Heinrich's property are jurisdictional. Nor has any court addressed the jurisdictional issue in this case in light of *Rapanos*. The Seventh Circuit ruling preceded the *Rapanos* decision and that court refused to rehear the case after the *Rapanos* decision. Accordingly, no valid jurisdictional determination has ever been made in this case. Therefore, the Seventh Circuit decision should be vacated and remanded in light of *Rapanos*.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT HOW TO INTERPRET THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

Before this Court determines whether to remand any case in light of *Rapanos*, as is warranted in this case, this Court should first resolve a conflict among the circuits as to how to interpret this Court's split decisions. The inability of the circuit courts to agree on the controlling opinion in *Rapanos* and the lack of any valid federal Clean Water Act regulations, has made enforcement of the Clean Water Act contradictory and unpredictable. The rule of law calls for a uniform jurisdictional standard that only this Court can give.

In *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), the First Circuit expressly rejected the conclusion of the Seventh Circuit in *Gerke* (06-1331, petition pending) that Justice Kennedy's "significant nexus" test in *Rapanos* is the "narrowest grounds" and the controlling opinion under *Marks v. United States*, 430 U.S. 188 (1977).

In *Marks*, this Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (emphasis added)). This test has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (N.D. Ohio 2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

However, the *Johnson* court points out that a number of circuits have abandoned this Court's *Marks* approach to split opinions or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." *Johnson*, 467 F.3d at 64. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'") (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks*, that the controlling opinion must be found among those Justices who concurred in the judgments, some circuits give equal weight to the dissenting Justices. The Seventh Circuit in *Gerke*, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. The *Johnson* court used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality standard in *Rapanos* or the Kennedy standard:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is

> satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

Johnson, 467 F.3d at 64.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " *Johnson*, 467 F.3d at 65. The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." *Id.*

This widespread circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Mark's* inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-746 (1994). It is time, therefore, for this Court to address this conflict.

CONCLUSION

In the absence of valid regulations defining federal jurisdiction under the Clean Water Act, and in the face of the circuit conflict over how to interpret the *Rapanos* decision, this Court should grant the writ of certiorari and set forth a uniform standard for the exercise of federal authority over inland wetlands.

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Respectfully submitted,

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